CLERK'S COPY.

TRANSCRIPT OF RECORD

Supreme Court of the United States

OCTOBER TERM, 1945

No. ~~764~~ 36

HARICE LEROY CARTER, PETITIONER,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

PETITION FOR CERTIORARI FILED JANUARY 21, 1946.

CERTIORARI GRANTED MAY 6, 1946.

SUPREME COURT OF THE UNITED STATES

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No. 764

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[fols. 2-3] **IN SUPREME COURT OF ILLINOIS**

No. 28625

PEOPLE, STATE OF ILLINOIS, Defendant in Error,

vs.

H. LEROY CARTER, Plaintiff in Error

Error to Circuit Court Livingston County, 3536

ORDER GRANTING LEAVE TO PROCEED IN FORMA PAUPERIS—March 22, 1945

And now on this day the Court having considered the motion by plaintiff in error for leave to sue as a poor person, for writ of error and for leave to file typewritten copies of abstract and brief,

It is hereby ordered that leave be granted to file petition for writ of error as a poor person without the payment of costs. Petitioner ruled to file record, abstracts and briefs on or before twenty days before the first day of the next term. Leave to withdraw petition granted, if requested, before record is filed. Leave granted to file eight typewritten copies.

[fols. 4-5] IN SUPREME COURT OF ILLINOIS

[Title omitted]

ORDER ALLOWING MOTION TO CONTINUE—May 15, 1945

And now on this day the Court having considered the motion by plaintiff in error for leave to continue cause to the September 1945 Term of this Court,

It is hereby ordered that the motion by plaintiff in error to continue cause to the September Term 1945 be and the same is hereby allowed.

[fols. 6-7] And afterwards, on the 18th day of August, A. D. 1945, the same being one of the days in vacation after the Term of Court aforesaid, there was filed in the office

of the Clerk of the Supreme Court a certain abstract of record which is in the words and figures following, to-wit:

[fols. 8-14] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

MOTION FOR LEAVE TO FILE WRIT OF ERROR IN FORMA PAUPERIS ON THE SEPTEMBER TERM OF COURT, A. D. 1945

Comes now, Harice Leroy Carter, etc., Plaintiff in Error, Affiant herein, and moves the Court that leave be granted him, as a poor person, to file herein *Eight Typewritten Copies of Abstracts and Briefs, and Arguments,* for Writ of Error, together with an original Certified Copy of the Common Law Record; and a Certified Copy of the Transcript of the Testimony as taken in the above-entitled cause on hearing to determine the sentence to be given the said Defendant, Harice Leroy Carter, etc., on his plea of "Guilty."

For which he forever prays.

Respectfully submitted, Harice LeRoy Carter, Affiant.

[fol. 15] IN CIRCUIT COURT OF LIVINGSTON COUNTY

Indictment for Murder

Gen. No. 3536

THE PEOPLE OF THE STATE OF ILLINOIS

vs.

HARICE LEROY CARTER, Commonly Known As Roy Carter, and LIVERA WORD

COMMON LAW RECORD

J. G. Whitson, Clerk.

INDICTMENT—Filed June 12, 1928

[fol. 16] STATE OF ILLINOIS,
Livingston County, ss:

Of the May Term of the Livingston County Circuit Court, in the year of our Lord One Thousand Nine Hundred and Twenty-eight.

The Grand Jurors, chosen, selected and sworn in and for the County of Livingston in the name and by the authority of the People of the State of Illinois, upon their oaths present that Harice Leroy Carter commonly known as Roy Carter, and Livera Word late of the County of Livingston and State of Illinois, on to wit: The thirty-first day of May in the year of our Lord One Thousand Nine Hundred and Twenty-eight at and in the said County of Livingston and State of Illinois aforesaid, with force of arms in and upon one James D. Churchill, in the peace of the People then and there being, unlawfully, feloniously, wilfully, and of malice aforethought, did make an assault and that the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, a certain pistol then and there loaded and charged with gun powder and leaden bullets, then and there unlawfully, feloniously, wilfully and of their malice aforethought, did discharge and shoot off, at, to, toward, against and upon the said James D. Churchill, and that the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, with leaden bullets aforesaid, out of the pistol aforesaid, then and there, by force of the gunpowder aforesaid, by the said Harice Leroy Carter commonly known as Roy Carter and Livera Word aforesaid, discharged and shot off as aforesaid, the said James D. Churchill, in and upon the body of him, the said James D. Churchill, then and there unlawfully, feloniously, wilfully and of their malice aforesaid thought, did strike, penetrate and wound; giving to the said James D. Churchill then and there with one of the leaden bullets aforesaid, a mortal wound of which said mortal wound the said James D. Churchill then and there instantly died. And so the Jurors aforesaid on their oaths aforesaid, do say that the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, the said James D. Churchill, in manner and form aforesaid, then and there unlawfully, feloniously, wilfully and of their malice aforethought did kill and murder contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

[fol. 17] And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further

present that Harice LeRoy Carter commonly known as Roy Carter, and Livera Word late if the County of Livingston and the State of Illinois, on the thirty-first day of May in the year of our Lord, One Thousand Nine Hundred and *Thirty*-eight, at and in the said County of Livingston and State of Illinois aforesaid, in and upon the body of one James D. Churchill in the Peace of the People of the said State of Illinois then and there being, unlawfully, feloniously, maliciously, wilfully and with malicious aforethought, did make an assault, and that the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, a certain pistol, commonly called revolver, then and there charged with gunpowder and divers leaden bullets, which said pistol they the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word then and there had and held then and there unlawfully, feloniously, wilfully and of their malice aforethought, did discharge and shoot off, to, against, towards, and upon the said James D. Churchill and that the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word with one of the leaden bullets aforesaid, out of the pistol aforesaid, by the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, discharged and shot off as aforesaid, then and there unlawfully, feloniously, wilfully and of their malice aforethought, did strike, penetrate and wound him the said James D. Churchill in and upon the body of him and chest of him the said James D. Churchill giving to him the said James D. Churchill then and there with one of the leaden bullets aforesaid, discharged and shot out of the pistol aforesaid, by the said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word, in and upon the chest and body of him the said James D. Churchill, a mortal wound, of such mortal wound the said James D. Churchill, then and there instantly died. And so the Jurors aforesaid, upon their oaths aforesaid, do say that the said Harice Leroy Carter commonly known as Roy Carter, and Livera Word the said James D. Churchill in manner and form aforesaid then and there unlawfully, feloniously, wilfully and of their malice aforethought, did kill and murder contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same people of the State of Illinois.

[fol. 18] And the Grand Jurors aforesaid, chosen, selected, sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that said Harice Leroy Carter commonly known as Roy Carter late of the County of Livingston and State of Illinois, on the thirty-first day of May in the year of our Lord One Thousand and Nine Hundred and Twenty-eight, at and in the said County of Livingston and State of Illinois aforesaid, unlawfully, feloniously, wilfully and of his malice aforethought, made an assault upon James D. Churchill, a human being, in the Peace of the People then and there being, with a certain pistol loaded with gun powder and divers bullets (leaden) in the hands of him, the said Harice Leroy Carter commonly known as Roy Carter then and there held and did then and there unlawfully, wilfully, feloniously and of his malice aforethought, discharge said pistol loaded with gun powder and leaden bullets as aforesaid, at, toward, upon and against said James D. Churchill and did then and there in manner aforesaid inflict upon the body of James D. Churchill aforesaid, a mortal wound of which said mortal wound the said James D. Churchill then and there instantly died.

And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid do further present that one Livera Word late of the County of Livingston and State of Illinois, then and there and at the time and place aforesaid, unlawfully, wilfully, feloniously and of her malice aforethought did then and there stand by and did then and there aid, abet and assist the said Harice Leroy Carter commonly known as Roy Carter in inflicting said mortal wound, whereof the said James D. Churchill then and there died as aforesaid.

And the Jurors aforesaid upon their oath aforesaid do say that said Harice Leroy Carter commonly known as Roy Carter, and Livera Word aforesaid, in manner and form as aforesaid, did then and there unlawfully, feloniously, wilfully and with malice aforethought, kill and murder said James D. Churchill contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

[fol. 19] And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that said Harice Leroy Carter commonly known as Roy Carter late of the County of Livingston and the State of Illinois, on the thirty-first day of May in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at and in the said County of Livingston and State of Illinois aforesaid, unlawfully, willfully and feloniously and of malice aforethought, made an assault upon James D. Churchill, a human being, in the peace of the people then and there being, with a certain pistol loaded with gun powder and divers leaden bullets in the hand of him, the said Harice Leroy Carter commonly known as Roy Carter then and there held and did then and there unlawfully, wilfully, feloniously and of his malice aforethought, discharge said pistol loaded with gun powder and leaden bullets as aforesaid, at, toward, upon and against said James D. Churchill and did then and there in the manner aforesaid inflict upon the body of James D. Churchill aforesaid, a mortal wound of which said mortal wound the said James D. Churchill then and there instantly died.

And the Grand Jurors aforesaid, selected and sworn as aforesaid, in the name and by the authority aforesaid, on their oaths aforesaid, further present that one Livera Word aforesaid at the said County of Livingston aforesaid in the State of Illinois before the said felony and murder was committed in manner and form and by means as aforesaid, to-wit: on the day thereof, did then and there feloniously, wilfully and unlawfully and of her malice aforethought incite, move, procure, aid, counsel and command the said Harice Leroy Carter commonly known as Roy Carter, the said felony and murder aforesaid, to do and commit, as aforesaid.

And the Jurors aforesaid upon their oaths aforesaid do say that said Harice Leroy Carter commonly known as Roy Carter, and Livera Word aforesaid, in manner and form as aforesaid, did then and there unlawfully, feloniously, wilfully and with malice aforethought, kill and murder said James D. Churchill, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

[fol. 20] And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that said Harice Leroy Carter commonly known as Roy Carter, and said Livera Word late of the County of Livingston and the State of Illinois, on the Thirty-first day of May in the year of our Lord One Thousand Nine Hundred and Twenty-eight, at and in the said County of Livingston and State of Illinois aforesaid, did then and there unlawfully and feloniously, with malice aforethought, by shooting, kill one James D. Churchill, a human being in the peace of the People.

And the jurors aforesaid upon their oaths aforesaid do say that said Harice Leroy Carter commonly known as Roy Carter, and Livera Word in manner and form as aforesaid, then and there unlawfully, feloniously, wilfully and with malice aforethought, did kill and murder said James D. Churchill, contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

And the Grand Jurors aforesaid, chosen, selected and sworn in and for the County of Livingston aforesaid, in the name and by the authority of the People of the State of Illinois aforesaid, upon their oaths aforesaid, do further present that said Harice Leroy Carter, commonly known as Roy Carter, and Livera Word late of the County of Livingston and the State of Illinois, on the thirty-first day of May in the year of our Lord, One Thousand Nine Hundred and Twenty-eight, at and in the said County of Livingston and State of Illinois aforesaid, did unlawfully, and with malice aforethought, by shooting, kill James D. Churchill.

And the Grand Jurors aforesaid upon their oaths aforesaid do say that said Harice Leroy Carter commonly known as Roy Carter, and Livera Word in manner and form as aforesaid, then and there unlawfully, feloniously, wilfully and of their malice aforethought, the said James D. Churchill, did kill and murder contrary to the form of the Statute in such case made and provided, and against the peace and dignity of the same People of the State of Illinois.

Neil Kerr, State's Attorney in and for the County of Livingston and State of Illinois.

On the back of which said Indictment appears the following indorsements: No. 3536, Livingston County Circuit Court, May Term, A. D. 1928. The People of the State of Illinois vs. Harice Leroy Carter commonly known as Roy Carter, and Livera Word. Indictment for Murder. A true Bill. W. D. Spence, Foreman of the Grand Jury. Witnesses: James Golf, Chester Herndon, L. R. Gagnon, L. M. Shugart. Filed June 12, 1928. J. G. Whitson, Clerk.

[fol. 21] In Circuit Court of Livingston County

Present: Hon. Stevens R. Baker, Judge and others as before. Attest: James G. Whitson, Clerk.

The People of the State of Illinois

vs.

Harice Leroy Carter, Commonly Known as Roy Carter

Indictment for Murder No. 3536

Judgment on Plea of Guilty etc.—June 15, 1928

This day come the said People by Neil Kerr State's Attorney in and for Livingston County and State of Illinois and also comes the Defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person into Open Court.

And the said Defendant Harice Leroy Carter commonly known as Roy Carter is here and now by the clerk of this Court furnished with a true copy of the indictment herein with the names of the People's witnesses thereon together with a list of the petit jurors for the present term of this Court.

And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of

proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment.

It is therefore considered, ordered and adjudged by the Court that the defendant Harice Leroy Carter commonly known as Roy Carter stands convicted of the crime of murder charged in the indictment under his plea of guilty entered of record in this cause.

And now this cause coming on further hearing the Court appoints L. W. Tuesburg a duly licensed and practicing attorney and a member of the bar of this Court to represent the said defendant Harice Leroy Carter commonly known as Roy Carter on question of mi*g*itation or aggravation of said crime of murder to which said defendant has pleaded guilty and which said question of mi*g*itation or aggravation of said crime of murder is hereby set down for hearing before the Court on *Mo*June 18th A. D. 1928 at nine thirty o'clock in the morning.

[fol. 22] In Circuit Court of Livingston County

[Title omitted]

Minute Entry—June 18, 1928

This day comes the said People by Neil Kerr State's Attorney in and for Livingston County and State of Illinois into Open Court. And comes also the Defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person and by L. W. Tuesburg his attorney, appointed by the Court to represent the said Defendant on question of mi*g*itation or aggravation of said offense, into Open Court.

This cause having been on the 15th day of June A. D. 1928 set d*w*on for hearing before the Court on this day on the question of mi*g*itation or aggravation of the offense on a plea of guilty of the Defendant Harice Leroy Carter commonly known as Roy Carter heretofore entered of record herein and the Court having heard all the evidence adduced by the said People as well as that adduced by*t* the said Defendant and having heard the arguments of counsel for both

parties and not being fully advised in the premises takes said matter of mitigation or aggravation of the said offense under advisement.

[fol. 23] In Circuit Court of Livingston County

[Title omitted]

Sentence—June 29, 1928

Now on this 29th day of June A. D. 1928 come the said People by Neil Kerr, State's Attorney in and for Livingston County and State of Illinois into open Court. And comes also the defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person into open Court.

And the said defendant Harice Leroy Carter commonly known as Roy Carter having been on June 15th A. D. 1928 being one of the regular days of this term of this Court furnished with a true copy of the Indictment herein with the names of the People's witnesses thereon together with a list of the petit jurors for the present term of this Court, waived arraignment and expressed a desire to plead guilty to the crime of murder as charged in the indictment and having been on said date of June 15th last aforesaid fully advised by the Court of the consequences of entering a plea of guilty of murder and of all his right- in the premises including his right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty of murder against him under a plea of not guilty but the said defendant Harice Leroy Carter commonly known as Roy Carter persisted in his desire to plead guilty and for a plea the said defendant Harice Leroy Carter commonly known as Roy Carter entered a plea of guilty to the crime of murder in manner and form as charged in the Indictment. And it was thereupon considered, ordered and adjudged by the Court that the said defendant Harice Leroy Carter commonly known as Roy Carter stand convicted of the crime of murder under his plea of guilty of murder as charged in the indictment then entered of record in said cause.

And this cause coming on further to be heard before the Court on question of mi*gi*tation or aggravation of said offense the Court appointed L. W. Tuesburg a legally licensed and practicing attorney and member of the bar of this Court to represent the said defendant Harice Leroy Carter commonly known as Roy Carter on question of mi*gi*tation or aggravation of said crime of murder to which the said defendant pleaded guilty and which said question of mi*gi*tation or aggravation of said crime of murder was set down for hearing before the Court on Monday June 18th A. D. 1928 at nine-thirty o'clock in the forenoon.

And the said cause having again and on the 18th day of June A. D. 1928 being one of the regular days of said term of said Court come on for hearing before the Court on question of mi*gi*tation or aggravation of said crime of murder the said People by Neil Kerr State's Attorney for said Livingston County being present in open Court and the defendant Harice Leroy Carter commonly known as Roy Carter also being present in open Court in his own proper person and by his attorney L. W. Tuesburg so as aforesaid appointed by the Court to represent said defendant on said question of mi*gi*tation or aggravation of said crime of murder.

And the Court having heard all the evidence adduced by the said People as well as that adduced by the said defendant and having heard the arguments of counsel for both parties and not being fully advised in the premises took said matter of mi*gi*tation or aggravation of said offense under advisement.

And now on this 29th day of June A. D. 1928 the same being another of the regular days of this term of this Court come the said People by Neil Kerr State's Attorney in and for said Livingston County into open Court. And also comes the defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person into open Court.

And the Court having heretofore and on the 18th day of June A. D. 1928 heard all the evidence adduced in open Court on the question of mi*gi*tation or aggravation of said crime of murder and being now fully advised of the premises after due consideration the said defendant Harice Leroy Carter commonly known as Roy Carter having been heretofore adjudged guilty of the crime of murder of one James D. Churchill on his plea of guilty heretofore entered of record herein.

It is further considered, ordered and adjudged by the Court that the said defendant Harice Leroy Carter commonly known as Roy Carter whose age the Court finds to be thirty-two years be taken from the bar of this Court to the Common Jail of Livingston County from whence he came and from thence by the Sheriff of said Livingston [fol. 24] County, to the penitentiary of this State at Statesville, Illinois and be delivered to the Warden or Keeper of said penitentiary, and the said Warden or Keeper is hereby required and commanded to take the body of said defendant Harice Leroy Carter commonly known as Roy Carter and confine him in said penitentiary in safe and secure custody from and after the delivery hereof for the term of ninety-nine years which is the sentence of the Court.

[fol. 25] STATE OF ILLINOIS,
Livingston County, ss:

I, H. D. Wolff, Clerk of the Circuit Court and ex-office Recorder, in and for said County and State, and keeper of the records, seal and files thereof, do hereby certify the annexed and foregoing to be a true and literal copy of Indictment filed in said Court on June 12, 1928;

Of certain proceedings had and entered of record in said Court on June 15th, 1928, In relation to the defendant Harice Leroy Carter, etc., Of certain proceedings had and entered of record in said Court on June 13th, 1928, In relation to the defendant Harice Leroy Carter, etc., Of certain proceedings had and entered of record in said Court on June 29th, 1928, In relation to defendant Harice Leroy Carter, etc. All in a certain case lately pending in said Court on the criminal side thereof numbered 3536 wherein the People of the State of Illinois are Plaintiffs and Harice Leroy Carter, commonly known as Roy Carter, defendant,

as the same appears from records and files now in my office remaining.

In testimony whereof, I have hereunto set my hand and affixed the seal of said Court at my office in Pontiac, Illinois, this 29th day of August A. D. 1944.

H. D. Wolff, Clerk.

[fol. 26] INFORMATION TO BOARD OF MANAGERS, ILLINOIS STATE PENITENTIARY

STATE OF ILLINOIS,
Livingston County, ss:

PEOPLE OF THE STATE OF ILLINOIS

vs.

HARICE LEROY CARTER, Commonly Known as Roy Carter

INDICTMENT FOR MURDER

#3536

1. Name in Full: Harice Leroy Carter, commonly known as Roy Carter.

2. Alias, If Any: None.

Age: (3) Thirty. Born June 8[illegible], 1898.

4. Occupation: Chauffeur, Mechanic, Cook.

5. Education: No Schooling. Can Read and Write.

6. Mentality: Average.

7. Disposition: Quiet.

8. Prisoner's Associates and Character in the Community: Defendant has been in Livingston County for the past three years and nev-r been in trouble before while here. His previous associates and habits are unknown.

9. Industrious or Idle: Industrious. Worked eight years for the Industrial Track Construction Co., St. Louis, Missouri. Last three years at Ballard and Johnson's Restaurant, Forrest.

10. Previous Record, If Any: None Known.

COMPLETE STATEMENT OF PRESENT ARREST & CONVICTION

The written opinion of the Trial Judge in passing upon the sentence of Carter is herewith submitted verbatim:

After imposition os sentence, Carter turned State's evidence and testified ag-inst Livera Word, jointly indicted with him, as an accessory. Yesterday the Jury found the Defendant Livera Word guilty of Murder and fixed her punishment at Twenty Years Imprisonment.

11. Recommendation, If Any: None except to call attention to the fact that Carter turned State's evidence as above set forth.

(Signed) Neil Kerr, State's Attorney.

I concur in the foregoing.

(Signed) Steven R. Baker, Presiding Judge.

[fol. 27] IN THE SUPREME COURT OF ILLINOIS

[Title omitted]

ABSTRACT OF TESTIMONY AT HEARING ON QUESTION OF MITIGATION OR AGGRAVATION—June 18, 1928

JAMES GOFF, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kerr:

Mr. Goff states (Absts. 1-8) that his home is in Kentucky, Campbellsville; that he came to Illinois, April 27th, 1928; that he was employed by one C. E. Morrison, Route 5, Pontiac, Illinois, on the 31st day of May, in the year last aforesaid; that he is a farmer.

That on the 31st day of May, he was hauling gravel for one Seymour Norris; that he was getting the gravel from Churchill pit, which was located North of the Fairbury road —a distance of about four miles. That he was hauling the gravel on the McDowell road, two and one-half miles East of McDowell; that the gravel pit is on the (East and West) road; that he came to an intersection and turned North, and that the "Domas Bridge" is about one and one-half miles from the pit.

That he knows James D. Churchill. That on the 31st day of May, last, he and James D. Churchill were hauling gravel [fol. 28] together. That they were driving separate teams on the afternoon of May 31, 1928; and that after they came to the aforesaid intersection of the Fairbury Road (the road running East and West) aforesaid, to the Churchill Gravel Pit, aforesaid, he turned Nort- about four miles. That he was taking it at the aforesaid McDowell Road. That iw was a four or five mile haul. That he was hauling gravel on

the (morning) of the 31st day of May; that he had occasion to see an automobile with colored people in it; that they pulled up (behind) him before he had gotten to the Demoss Bridge. That there was two roads. One was a bad road, and the other was a beaten track. That the latter, was he supposed, on the West side—or the left side of the road. That he was driving his team on the left side of the road, and had been driving on that side all of that day.

That at the time he met the negroes they passed him—in a blue Chevrolet four-door sedan. And that there were four women and this man (presumably the defendant, Harice Leroy Carter) in the car. That, this morning, they drew up behind him and blew the horn for him to pull out; that he turned around and motioned for them to go around; that he (Carter) cursed him when he passed; that the women also cursed him. That he again, that same day, saw those same colored people; that they drove North over the bridge, and came back on the South side, and parked. I drove on down, they got out of their car. I heard loud talking behind the wagon. I was perhaps a rod ahead of them but I could hear them. I drove on; didn't pay any attention to them. "I did not get out of the wagon," he said. That he saw them again that day after • • • "I had left the gravel pit at six minutes before four o'clock, and I guess I was ten minutes on the road." That Churchill was hauling gravel that afternoon • • • "He was behind me • • • about two or three rods • • • He was there at the gravel pit when I loaded up, but I loaded first [fol. 29] and got started." That when he seen those colored people that afternoon • • • he and Churchill was "at the turn of the road two rods from the gravel pit, maybe four rod- in the turn of the road." That he was on the North and South road, South of the Demoss Bridge, and we were going North and they were coming South. That I was on the front wagon. That I saw them coming and they pulled right into my team • • • I didn't have time to pull out • • • This man said "Why in hell don't you pull over here?" This (niggerman), he says: "Why in hell don't you pull out?" and I says: "Well, the rest of the folks go round. Why don't you?" He says: "You are on the wrong side of the road." I said: "The rest of the folks go round me," and he pulled right into my off horse and the horse jumped." He said: "God damn you, get over and stay over," and the women cursed me too, and they went

on. I looked back and saw them take Churchill the same way. That "He stopped Churchill, and I got off my wagon and started back. * * * Churchill got off and argued with them. They cursed him. The women did; I didn't hear this fellow." That he heard "loud talking". That Churchill looked around to see if there was any license on the car. There was not. He gets on his wagon and pulled around him, and as he passed Churchill got a handful of gravel off his load and threw it on the car. That, "They stopped the automobile and got out, the three women, Livera Word, and the other two women, and I heard them call Churchill 'a yellow son of a bitch' and a god-damned white son of a bitch.' That I didn't hear Churchill swear. That he and Churchill proceeded on with their loads.

That this witness saw this colored man in the automobile again that afternoon, when he and Churchill were driving North, (twenty (20) minutes later) and when there was an automobile pulled up behind them. That it was presumably the same one. That a (nigger-man) and woman were in it. The man driving "This man here."

Asked by Mr. Kerr to tell in his own words what happened: this witness said: "The nigger says 'I blew my horn'; and he says: 'What did you mean by throwing gravel on my automobile?' Churchill says: 'I meant just what I did.' So the nigger says: 'Get off.' and Churchill got off. I got on my wagon. The front fenders was up past the rear wheels on Churchill's wagon. That Churchill was in the West track. He asked Churchill to get off the wagon, and he got off. The nigger slid out from under the wheel, stepped sideways. (Indicating) and commenced firing."

That three or four shots were fired, and one at him. That all he said was: "You too." That when the defendant, Carter, fired at Churchill, "he just stood there till he hit him, then he went down. That he was standing "in this position" (Indicating) and fell down and said: "O, Lord!" * * * That Churchill fell four foot off his wagon * * * in the middle of the road. That the gun was a blue-steel one, with a hammer on it. "Looked to be a .32 or a .38 with a 5-inch barrel—a pistol type." That he saw the defendant when he got out of the automobile; that he saw where he got the gun from. That he got it from his hip; back here. (Indicating) That he doesn't know whether he got it from a holster or not. That there was no further conversation

between the defendant and Mr. Churchill before the shooting started. That after the shooting—"I ran across the road and got in the timber and got away. Called the sheriff." That the colored people got in their car and went back toward Fairburg. That about three minutes later he came back there, found the body in the road. That the body was [fol. 30] still lying about the middle of the wagon, might have been a little to the North of the center of the wagon. That the team was in the same place. That Norris came up just as he got there, and Herndon. That he, Herndon and Norris got there approximately at the same time. That they said he was shot through the heart; that he was dead. That he took part in the examination to see if there was a bullet hole in him. That there was one. That they (moved) the body and laid it on the cushion of the (car). That Mr. Norris drove Churchill's car up there. That he took the cushion out of the automobile and laid the body on it. That (he) did not move the body. That from the time Churchill had tossed these stones at the automobile, it was any way twenty minutes or more * * * before he returned.

This witness testified that they had travelled "maybe a couple of miles * * * and 5-9/10 miles North of Fairbury to the place where the fatal shooting occurred.

This same witness testified, on cross-examination, as follows:

(Abst. 8.) That he was driving on the (left-hand) track on each of the occasions when this defendant passed him or met him. That he was driving in the (left-hand track) at the (last) time when the shooting occurred; that both wagons were on the left-hand side. That the character of the right-hand track, at that place, was very rough and rutty. That the character of the (right-hand track) where they met Goff and Churchill in the afternoon,—(was good). That "on the (left-hand side) it *was good,* (the right-hand side) *was bad.* That the beaten track of the road was wide enough for two cars to pass. That, (Abst. 10) he was keeping in the left-hand track, where it was good all the time—*regardless of who came along.* That when the people in the Carter car came up behind him in the morning, they cursed him. That the women folks and Carter did, too. That he did not "say a word, only motioned for them to come around him."

That, (Abst. 12) the defendant said, God damn you, get over there and stay over there * * * then it was, then

he dashed by. That he distinctly remembers hearing him say these two things, but don't remember him saying anything else.

That when he testified that somebody said "God damn you, you want all of the road," he was before the coroner's inquest. That he doesn't remember that statement being made, unless it was him (defendant) there, he said it, I think. That the defendant did make such a remark in addition to: "God damn you, get over there and stay over there." That, (Abst. 13) it is possible that he might be mistaken * * * that he don't think he could be mistaken about the exact words the defendant used. That, even though a moment ago he couldn't remember * * * "I could only hear two or three words."

That the defendant had to go outside the (beaten track) on the left side to pass, which was pretty close up to the far side of the track; that to get by Goff's wagon, on the right side, defendant had to nearly get off the road. That after the car had passed, he stopped his team in the middle of the road and got off his wagon right away. That they had met Churchill before he had gotten off his wagon. That, "before I got off I looked to see if they stopped Churchill, and they did". That he waited to see if he was going to stop him or pull around him. That he stopped right in front of Churchill. That they stopped in front of [fol. 31] Churchill for maybe a minute. That he, Goff, had started in that direction; that he saw Churchill looking to see if there was a license; that he had got off his wagon and looked at the car, front and rear, to see if there was any license plates on it and an effort to open the hood of the car. That Churchill afterwards told him "he wanted to see if it was a stolen car." (Absts. 14-15.) That he got off on the West side of his wagon and walked to the right side of the car; that he never got it open. That then he got back on the wagon and then they pulled around him—on the right side of him, just as they had done with him. That he don't know if the road was wide enough so that they had plenty of room, nor did he know if they almost had to run into the ditch. That when they passed Churchill by he (threw) the gravel on the car, and they stopped a short distance behind the wagon. That he, Churchill, picked up a handful of gravel and threw it (overhand) just like this: (indicating). That it hit the (top) of the automobile—most on the top. That it was small pebbles, mostly (sticky, muddy

gravel); that there could have been a few stones in it. That when Churchill had thrown the mud on the car, he (Goff) said he was still coming toward Churchill, then they all jumped out of the automobile. * * * That the car had stopped "maybe fifteen or twenty feet past the wagon; that he didn't see the defendant, Carter, get out; That he heard the women call Churchill a yellow son of a bitch and a God damn white son of a bitch; that he didn't hear anything that Churchill said to them. That (Abst. 17), he don't think he did—or, he may have said something that he didn't hear. That he may have thought a lot but he didn't say anything. (Upon further questioning) Mr. Goff acknowledge that: Mr. Churchill might have said something that he didn't hear. That he was a relatively short distance from the wagon after they drove off.

This same witness was asked the following questions and he made the following answers to the questions: "Q. Did you holler to Churchill or say anything to him?" A. "I don't know whether he heard it or not. I told him I was coming up to help him out." Q. "Said it loud enough so he could hear?" A. "I don't know whether he heard it or not; I thought he was going to have to have help." Q. "Did Churchill appear to be alarmed or scared when the four women jumped out of the car?" A. "He didn't seem to be, I was not very close to him. * * *"

That he seen Percy James and Chester Clandon, who were fishing straight across from where the argument was—about a rod, or a rod and a half.

That he never saw them till he, defendant, had blew the horn of the car * * * a rod and a half or two rods North of the bridge; that the car was right up against the right side of Churchill's wagon, on the right side, when he blew the horn. That the wagons were still on the left side of the road, when the defendant pulled up on the right side of Churchill's wagon. (Abst. 19.) That when he blew his horn and Churchill stopped his team, and I stopped mine, also; that the fenders of Carter's car were even with the rear wheels of Churchill's wagon. That the fenders were about eight feet—six foot, at the very least—from the rear wheels of the wagon, which was the position of the car and wagon while the shooting occurred. That the first thing that happened was Carter said to Churchill: "What did you throw that (gravel) on my car for?" That this witness denied that he had made the following question at the

Coroner's Inquest, to-wit: Carter said to Churchill: "What did you mean by throwing that (dirt) on my car?" The witness insists that the word was (gravel), not (dirt.) [fol. 32] That the defendant asked Churchill to get off his wagon. That he (jumped) down off the wagon after Carter said that.

That this same witness was asked: "Which way did he face when he got off?" and the witness answered; in the same hostile manner: "The nigger was on the East side of the road, he was facing him. That "Churchill stepped a couple of steps away from the wagon towards the car." * * * "And the nigger (slid out from under the wheel) and took two steps sideways and fired at him." That he shot from the ground. That there was three or four steps between Carter and Churchill when he first shot. That Churchill's horses were (still at the end gate of witness's wagon.) That he had stopped his wagon right there, too; that he got off his wagon before the shots were fired * * * That he got off his wagon at the same time Churchill did. That he first seen the (revolver) drawn from his hip—from behind his hip; that he had a coat on. That Churchill had nothing on over his shirt.

In describing the defendant's actions or movements, he said: "He came out of the car with his hand back here (indicating) and drew it out, he didn't (take any sight), shot very fast." That he was behind Churchill when the first shots were fired. That he was five or six steps from Churchill—or about twelve feet away from Carter. That this witness further testified: that Churchill was about five feet, six inches tall; and that he stood six feet, two inches.

That he couldn't be sure whether Churchill came above his shoulders; that he don't know anything about his heighth. That those three shots came right after each other without any perceptible interval. That he stood there after he fired the three shots—till he, (Carter) said, "You, too!" That he started away from the scene of the crime—and Carter said: "You, too!" That he ran over to the timber, maybe a rod and a half, then he came back across the road and the car had gone. That he went up to Seymour Norris's to telephone, and they didn't have a telephone, had to go to a neighbor's.

That, as to the description given of the gun, he is positive in the flash of time it took to get the revolver out and shoot

three times and shoot once at him, he saw all those details (Abst. 22) about the gun.

The Court: "When did he put his hand back to his hip?" A. "When he put his hand on the wheel and shoved himself out—he put his hand on his hip and left it there, after he got out he brought the gun out."

CHESTER HERNDON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kerr:

This witness testified, in part, that, (Abst. 23) he lives four and one-half miles North of Fairbury; that he knows the deceased, James D. Churchill during his lifetime. That he did not know the defendant, Harice Leroy Carter, personally; that he knew where he worked. That he worked at Hanson's garage in Fairburg. That he didn't know where Carter worked on the 31st until he was told.

[fol. 33] That the witness further states: that he, too, was hauling gravel on the 31st of May from the Churchill pit; that he was hauling to the same place as Mr. Goff and James Churchill. That he was on the road the Demoss bridge goes across that afternoon. That he saw Churchill's wagon North of the Demoss bridge; that Churchill's wagon was about two or three hundred yards North of the Demoss bridge. That he was on the bridge, had stopped to rest his horses, and saw Churchill lying in the road there, but never thought anything about it • • • That he thought it was some of the boys who had got off the wagon to rest.

That he proceeded further North; that he stopped when he got there. That when he got off there, Seymour Norris and Jim's hired man pulled around me and motioned for me. That he don't remember just when Goff got back there. That Churchill was down on his knees and feet with his head in the road when he got there; that he was dead. That he walked up to see him as they pulled his shirt back; that he saw the wound "on the chest". That, that was right around (half past four) That he has lived around that part of the country seventeen years. That Churchill's body was found in Livingston County. That he helped to get a robe out of

the car, and a cushion. That he did not continue on with his load; that he left the team in the road and went away in the car. * * * In Jim Churchill's car. That he did not return back to the scene of the shooting that afternoon, but went to Forrest. That he was there when Buck Gagon was talking to him * * * at what used to be the Carmon Hotel. (That he did not come back to Pontiac that night.) That he saw the colored people in the automobile. That he saw the defendant and a woman in the car and they were going North; that they passed him going toward the Churchill wagon. That they met him coming back. That it was not a very long space of time that they passed going North that they passed him again going South * * * That he didn't drive a half a mile with his team before they returned. That he might have heard the shots but he didn't pay any attention; that there is so much shooting down that way—by hunters and fishermen and loafers. That if he had heard any shooting he would not have paid any attention. That the defendant was driving at a good gait; that he honked for me to get out of the road * * * That the defendant was driving the Chevrolet car. That they were driving at a good gait when he met them coming back; that the defendant was driving on both occasions. That he did not see the woman run down the road; that there were only two people in the car both times he saw it. That when they met him coming back they continued in a Southernly direction, and they never honked when they came back. That he was on the (wrong) side of the road both times. That we kept the smooth track, we hauled such loads we couldn't get out for the cars to pull around.

Cross-examination.

By Mr. Tuesburg:

On cross-examination, this same witness testified:

That he was about a mile from the bridge, between the gravel pit and the bridge when Carter's car passed him going North. That the team walked about three miles an hour, depending on how hot it was; that they were not walking fast then. That he hadn't got quite a half mile North when they met him coming back. That when they passed him going North, he did not pull out and give them the road. That they went around him on both occasions; that they

honked for the road several times as they passed him, going North; that they didn't say anything.

[fol. 34] That it must have been something like ten minutes from the time he met them till he reached the bridge and stopped the horses * * * to rest. That he rested his horses about two minutes, that, he then drove on down to where the body was * * * That he saw the body while he was on the bridge. That he don't remember when Goff got there, but he remembers that he was there. And the other two fellows was there. That they all got there on or about the same time.

Percy Jones, being first duly sworn, testified as follows: (Abst. 27)

Direct examination.

By Mr. Kerr:

On direct examination, this witness testified, that he lives in Bloomington, Illinois; that he is a Practicing Attorney. That he wasn't following that occupation the afternoon of May 31st., last; that he was fishing about a quarter of a mile South of the old Stockett place, where the river comes close to the road; that it is about a mile from the gravel pit. That he knew James D. Churchill during his lifetime. That he saw him hauling gravel that afternoon; that he has known James Goff since the Coroner's Inquest. That he didn't see Goff that day * * * that is, to recognize him. That there was a (number) of people hauling gravel.)

That he had seen negroes there that day. That it looked like a Chevrolet the first time he saw it; that he had parked the truck that he had brought his brother-in-law out in, in Jim Churchill's barn lot, then he walked back to where they were fishing * * * where the river hits the road * * * after he got back he happened to think that he had left the dough bait in the car (truck) and he walked back along the road * * * going North * * * to Jimmy's house. This car passed going North towards the Demoss bridge; thinks that it was in the afternoon that they hollered at him. That they were going at a pretty good lick of speed. That the next time he saw them he had come back and was fishing—probably a half hour—and then he heard the cursing, and he walked to the fence; that just as he got there they

started up the road; that they were going South on the angling road, where the road comes straight South and then makes an angle towards the South-West. That a man was driving the car, and a (nigger woman) was in front with him, and a couple were in the back seat. That they were cursing and shaking their fists * * * that he heard the following remarks: "A (yellow) son of a bitch, and a (white) son of a bitch." That those names came from the car. (It may be proper to call your attention here to the fact that the defendant, Harice Leroy Carter, is of a very light complexion—a mulatto.) That he does not know who made the latter remarks as he says: "They were *all* hollering." That Churchill was North just getting back up on his wagon.

Cross-examination.

By Mr. Tuesburg:

On cross-examination, this same witness testified as follows: That (Abst. 28-33), he had gotten out there right after dinner—probably a quarter of one. That he parked his car at Churchill's house (describing the locality of the Churchill's home, etc.). That the first time he saw Carter's [fol. 35] car he had got off of Jim's dump-board wagon and had (started) fishing, but he had forgot to take the dough bait out of the car, and it was about one hundred yards from the bend, where the road starts East, that this Carter car passed him, there; that, at that time, Carter was driving and a colored woman was in the front seat, and (two) women and a young colored boy were in the back seat. That the boy was about thirteen or fourteen years old. That he knew Livera Word by sight, and one of the Guthrie girls. That he had lived around Fairbury all of his life. That the young boy was the son of the Guthrie woman. That this first meeting of the colored people in the car on May 31st, was probably a quarter after one o'clock; that when he heard the argument between them and Churchill, after having first seen them, it must have been a half an hour or three quarters of an hour after that. That that would put it somewhere around two o'clock in the afternoon, he imagined so * * * Witness gives a clearer description of the lay of the land there with regards to the Churchill home, and the approximate distances surrounding the near vicinity of this unfortunate occur-ance—etc. (which, at this point of the witness's testimony would seem to be needless repetition.)

That (Abst. 32), he did not pay any attention to Goff's wagon; that there might have been other wagons North of where he was but he didn't notice any. That he don't remember seeing a man coming from the North towards Churchill's. That he heard some loud talking but he didn't (see who was doing it at the time it was going on.) That he heard somebody call somebody a (yellow) son of a bitch, and a (white) son of a bitch, and it sounded like colored women. That he did not recognize any white man's voice. That the voices he heard were womens'; and that he had heard Jim just as they were driving away. That after they had got through cursing him (Jim) he said: "Well, I am not a nigger, anyway." That he didn't say "God-damned nigger." That he didn't hear him say: "I am not a black son of a bitch." That he didn't see him throw anything at their car. That Chester Claudon was fishing, at that time, down the river, North of him, about nfty yards.

The Court: "Mr. James, as I understood, when you first heard this loud talking you were down on the river bank?"

Answer: "Yes."

The Court: "When you got up to the fence, the Churchill wagon was North of you?

Answer: "Yes."

The Court: "And the car started South, and was South of you?"

Answer: "Yes."

The Court: "When was it you heard those expressions, was it after you got to the fence?

Answer: "Before I got to the fence, and as I got up there they were still cursing and waving their hands.

The Court: "Both of them had started on at that time?"

Answer: "Yes."

The Court: "So that one was North of you, and the other was South of you?"

Answer: "Yes."

The Court: "Could you tell where those expressions came from, whether from the car, or where they come from?"

Answer: "The (last) ones I knew came from the car, but whether the (first) I wouldn't say."

Court: "Those expressions you mentioned, could you tell where they came from?"

Answer: "They were all cursing, practically all of the time, just continually.

[fol. 36] The Court: "You heard somebody called a (yellow) son of a bitch, and a (white) son of a bitch?"

Answer: "A great many times."

The Court: "What kind of voices?"

Answer: "Colored women."

The Court: "They used those expressions?"

Answer: "Yes."

C. J. CLANDON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kerr:

On direct examination, Mr. Clandon testified: that, he lives in Fairburg; that he has been living there forty years; almost all of his life. That his business is that of Farm Manager.

That he was fishing on the afternoon of May 31st, 1928. That the place where he was fishing was four and one half miles North of Fairburg. That he got out there between half past one and a quarter to two.

That he saw James Churchill haul his first load that afternoon; that he seen him come back again and saw him come back with the second load. That the first time he came back he hollored at him and asked him how fishing was; that he went on with his load and hollered back * * * of course he had to go to the gravel pit and load up * * * A little while later is the first he heard of the commotion in the road; that he first heard a lot of cursing; that by the time he got up there it was practically all over with.

That he was a block and a half North from where Percy James was fishing; that he judged Churchill was one hundred and fifty feet South of him, and the car South of him yet. That the State's Attorney asked him: "Did you hear any cursing?" and he said: "Just heard it." Asked: "Did you talk with James Churchill after that?" And he said: "Immediately when I got up there the (other car) was just pulling away, so that I didn't *see* anybody in the car at all. Jim pulled up along the fence and was kind of laughing about it. He said: "(Q. Don't tell what he said. I don't think the Court would allow you to.)

That he couldn't have had time to discern the make of the

car, but said it was a sedan; that he couldn't say how many people were in it.

(That he heard Percy James testify this morning. That he thinks he was off on the hour, he (James) got it confused with the first and second loads.)

That he seen a man North of Churchill walking towards Churchill, but he did not know at that time who it was because he had gotten even with him just as the car pulled away.

Cross-examination.

By Mr. Tuesburg:

[fol. 37] On Cross Examination this same witness testified: That, (Abst. 35) he was a hundred and fifty feet from Churchill's wagon after he got up there. (To the fence.) * * * That the Goff's wagon was North of him; that he hadn't the slightest idea "how far" off Goff's wagon was * * * he didn't particularly notice the wagon * * * that he noticed him running up the road. That he didn't pay much attention to his wagon; that he saw him, not knowing who he was at the time. That he should judge that he was about an eighth of a mile from the junction of the two roads, which he confirms was a slightly Northeast direction.

E. F. Law, being first duly sworn, testified as follows:

Direct examination,

By Mr. Kerr:

On direct examination, (Absts. 36-37), Mr. Law testified that he is a practicing Physician and Surgeon, practicing in Fairbury. That he had been duly licensed to practice medicine since 1903. That he knew James D. Churchill during his lifetime.

That he was called to James D. Churchill's body on the afternoon of May 31st, last. That he made an examination. That he found him lying in the road, straight North of Fairburg; and a short quarter of a mile North of the Demoss bridge. That as he recalls it, he was lying on a blanket with, he thinks, an automobile cushion supporting his shoulders and head; that his head was pointed rather to the Northeast. That he couldn't say as to whether Churchill's team was there * * * but (there were teams there.) That he

didn't look at the time, but he would say that it was about 4:20 or 4:30 when he got the call. Due to a misunderstanding, it was ten minutes to six when he finally arrived there. * * * That he made a rather superficial examination, and Churchill was dead. That he examined the chest, but did not examine the back. (That he was badly soiled with blood that night.)

That the next day he examined the body, and there was a wound in the left chest, about two inches inside the nipple line, between the fourth and fifth ribs; and it evidently went completely through the chest, coming out on the right side between the seventh and eighth ribs about four inches from the spinal column. (That he wouldn't go down on record as saying that the bullet penetrated the heart) as no post mortem was made, but he is quite sure that it did. That such a wound would cause death. That he thinks it would cause instant death.

Cross-examination.

By Mr. Tuesburg:

On cross-examination this same witness testified: that he wouldn't care to state definitely how close they were together when the shot was fired; that there appeared to be no powder burns. That he could not determine what calibre of gun it was; that he is not familiar with calibres of guns; that he never owned a gun; that it was a fairly good-sized gun. That the wound was more lacerated where it came out than where it went in.

L. M. Shugart, being first duly sworn, testified as follows:

[fol. 38] Direct examination.

By Mr. Kerr:

On direct examination, Mr. Shugart testified that, (Absts. 38-42), he had been sheriff of Livingston County from 1922 to 1926; that he also was acting sheriff of said county from along the middle of May until the first week in June, 1928. That he was acting sheriff and a deputy sheriff on the 31st day of May, last. That he remembered the occasion of the killing of James D. Churchill.

That the defendant, Harice Leroy Carter was (given over) into his custody the evening of May 31st, 1928. That he is in Court; that he knows the defendant to be around thirty-two years old.

That he remembers having a conversation with several people and the defendant on the evening of May 31st, at the County Jail, in which he was put. That the State's Attorney, Neil Kerr, Assistant State's Attorney, Burnell Phillips, William A. Patterson, Chief of Police, Clarence Hartley, Deputy Sheriff, himself and the defendant were present.

(Mr. Tuesburg objects to the present witness telling the Court where it happened and the hours and what was said, and by whom — as being incompetent "unless the (defendant) testifies.)

The Court: "He may answer."

Witness: "Around 8:30 P. M. the State's Attorney, Neil Kerr, and himself and Mr. Patterson and Clarence Hartley and Mr. Phillips held a conversation in the County Jail in Pontiac, regarding the shooting of James D. Churchill. The conversation was about where he was during the day; whether or not he had committed the shooting of James D. Churchill; and at that time Carter told the story that he had been sleeping in the afternoon at the residence where he stayed. We asked him if he had driven Livera Word's automobile that day. He said: 'No.' He said he had had it that morning, took it to Hanson's garage and had it greased; then took it back, and after that he had gone to his room and gone to bed because he worked nights in a restaurant in Forrest. We asked him if he hadn't been fishing with some colored ladies that day, and he said: 'No.' We asked him if he hadn't driven Livera Word's car out to where they were fishing, and again he said 'No.' We talked quite a while along that line, and he insisted that he had been in Fairburg, sleeping.

"That, Livera Word came in before Carter, and we asked her to tell the story she had told them previously; then she related the story that they had gone fishing in the afternoon of May 31st, in company with her sister, Ella W. Henderson, Florence Caldwell and a girl 'called Lorene McDaniels'.

"That they had gone North of Fairburg to the Demoss bridge, out in that neighborhood where they had been

fishing; later they returned to Fairburg (along later in the afternoon.) As they were going South into Fairburg, at a point just North of the road that runs to the gravel pit, they had met a couple of wagons with some white boys hauling gravel; and the boys were on the wrong side of the road, and they had some conversation about them being on the wrong side of the road. But finally they had continued their trip into Fairburg, and after they arrived there, Lorene McDaniels, Ella Henderson and Florence Caldwell had gotten out of the car, and that Livera Word, herself, the defendant had gone back [fol. 39] to the Demoss bridge and had crossed the bridge, where they came up behind these same two wagons again; that they stopped their car at a point just about even with the rear wagon, and they both got out of the car. Both she and the defendant. We asked her if she heard any shooting and she said 'No.' That was all of that conversation and was made in the presence of Carter." Witness said that "We took Livera Word out of the place where we had been talking. I asked the defendant if that story was true and he didn't have anything to say at that time. Mr. Kerr and myself started out, and Carter called to Mr. Hartley and told him that he wanted to see us, and we went back into the jail and he told us the story."

This State witness continued his story, as follows: (On direct examination): That "at that time we went back in; after he had sent for us; that Mr. Patterson, Neil Kerr, Burnell Phillips, Clarence Hartley and myself and the defendant . . . ."

The Court: "Was there any record of this talk made, any stenographer present?"

Witness: "No, nothing more than pencil notations I may have made."

Mr. Kerr: "Go ahead."

Witness: "Mr. Kerr told him he had been told by Mr. Hartley that he wanted to tell the story and Carter wanted to know (what the consequences might be if he did tell the story.) Mr. Kerr informed him that the punishment could be life in the penitentiary, or that it might be death in the electric chair; and that anything he said must be said voluntarily. He said he was not afraid of life in the penitentiary, but he didn't like to talk about the chair. Mr. Kerr said that he was making him no promises whatsoever; that if he still wanted to

tell the story he could tell it in the presence of the men who were there."

Mr. Kerr: "Go ahead."

Witness: "And he answered the questions we asked him about how he had gone fishing. He told the story about the same as Livera Word had told it; they had gone fishing and on their return trip met with the boys who were hauling gravel, and there was some discussion about them being on the wrong side of the road; and that they continued their trip into Fairburg where the three girls (colored ladies) got out; and he said he had gotten out and got a drink, and Livera Word had got a drink, and he had gone to the toilet and when he came back he got in the car and there was a gun lying on the front seat of the car. He went on with his story that he and Livera Word drove back to the point North of the Demoss bridge, and that these two wagons were (very close) together. They asked these white boys what they meant by throwing gravel at their car, and they got off the wagon, and Carter shot the fellow. We asked him if he knew who the man was, and he said 'No.' We asked him if he could describe the man, which he did. He described the man he had shot as having on a red shirt and khaki pants, and another fellow as having on blue overalls and a straw hat. He said this second man had ran into the timber after the shooting. He said the car was turned around, and he and Livera Word returned to Fairburg. That after he got there he drove the car [fol. 40] into the garage in Fairburg, and that he was working in Forrest. That he went over to the house where he stayed, and then went up to Hanson's garage where he got a man to drive him to Forrest. In the first part of his story he said the gun was in the car all day, and that it was his own gun. We asked him where he got it, and he said he bought it from a fellow in Kansas about a year and a half ago. He gave us the name of the fellow, but I have forgot. He said it was a blue-steel Colt Special. Belonged to him. We asked him what he did with the gun, and he said that he threw it in the river as he drove over the bridge after shooting the fellow.

Cross-examination.

By Mr. Tuesburg:

On cross examination this same State's witness testified (Absts. 42-44): That when the defendant, Carter, was telling him about the conversation in regard to the team being on the wrong side of the road * * * he did not go into details as to what was said * * * "nothing more than that they were on the wrong side of the road; and that there was some discussion and some cursing (back and forth):" That the defendant had said: "he, the white boys, cussed him; that he didn't do any cussing, but the women did."

That when the defendant was telling him about going back and crossing the Demoss bridge, and coming up to the wagon, and stopping just before the shooting, that he *didn't* tell him anything about anything being said by any of the parties.

The Court: "Are you familiar with that locality out there?"

Witness: "Quite so."

The Court: "Do you know where the Churchill gravel pit is?"

Witness: "Yes."

The Court: "There is a road comes in from the West and ends at the North-and-South road?"

Witness: "It comes in at a jog, at a 'T'-point."

The Court: "The Churchill gravel pit is near the corner, that comes in from the West but doesn't proceed on West. Is that right?"

Witness: "Yes."

Mr. Tuesburg, (continuing on cross examination of the same witness): That the defendant had told him several stories about this gun; that he had checked up on these stories and found them partly untrue. That several days elapsed while the defendant was telling these stories, (Abst. 43.) and he told a different story on different days.

That when he last mentioned that the defendant said he had went in and got a drink, he didn't say it was water; that he presumed it was that, or that that is the way he understood it. That this confession was made without any [fol. 41] promises or offers of any kind; that the defendant was informed by the State's Attorney that if he talked

it was purely voluntarily; that the defendant wanted to know what might happen if he would say that "he had done the shooting," and the State's Attorney told him "if the story checked up he might get from fourteen years to life in the Penitentiary," and he "might be sent to the electric chair." That that confession was made at the County Jail in Pontiac, "at 8:55 on the night of May 31, 1928."

W. A. PATTERSON, being first duly sworn, testified as follows:

Direct examination.

By Mr. Kerr:

On direct examination, Mr. Patterson testified: that he is Chief of Police, and also holds a commission out of the Sheriff's office; that he has had it about thirty (30) years. That he was sheriff from 1910 to 1914. That he was a deputy sheriff on the 31st day of May, 1938; that he was present at a conversation "wherein the defendant and several other parties were present." That Neil Kerr, the State's Attorney, the Assistant State's Attorney, Mr. Phillips, Deputy Sheriff Shugart, Clarence Hartley and himself were there.

This witness was asked by Mr. Kerr to tell just what took place between the several parties there. He stated: "*We all went in the cell and got him out in the pen,* AND then went to talking to him; about his first remark was "what would be the consequences" providing he told them what was done. That the State's Attorney, Mr. Kerr, at that time explained to him the conditions of the crime and the various punishments he might get; that he might get the electric chair and he might get fourteen years to life in the Penitentiary; that there were no promises made by anyone; that under these conditions, he went on and admitted that he had shot the man.

This witness further stated that the defendant, Harice Leroy Carter, said that he and four women were out in the afternoon, fishing; that when he got ready to drive home they got in the car, down South of the Demoss bridge; that he came upon a couple of teams hauling gravel; the teams held the road; that they had to get out a little farther than

what they thought was right; that (Abst. 45.) they got into an argument and quite a number of words took place. Finally they left and drove on into Fairburg. Later on, the defendant and Livera Word came back and met the two teams North of the Demoss bridge, about forty or fifty rods; that they got into another argument; that the defendant said they got to talking and asked Churchill: "Why he didn't give them the road?" And "Why he threw rocks at the car?" That the defendant said: "One word fecthed on another, and Churchill got off his wagon, and he got out of the car; and Churchill put his hand up as though he was going into his shirt for a gun, and then was when he pulled and shot him three times." That Livera Word started running down the road; that he turned the car around and picked her up and drove back to town.

That the defendant further said, in his presence in the County Jail, on the night of May 31st, 1928, that he "threw the gun in the river as they were crossing the bridge." [fol. 42] That "We gave him a 'Hearing' about three o'clock in the morning; that on their way to Bloomington, *(See petitioner's personal notes, Pages 10-11 of Brief & Argument.)* as they sat in the back seat of the car, he got to talking with the defendant and asked him who the gun belonged to, and he "refused to tell." That the defendant finally said: "When they got back in the car, the second time," that "the gun was lying on the seat wrapped up in newspaper, and that as he got out of the car he picked it up off the seat, still wrapped in newspaper, and put it under his arm." That he told him that on his "way to Bloomington."

That (this morning) he admitted a different story, entirely: that the gun was put on the seat while he was getting a drink * * * that he said he stuck it down the "left side" of his trousers, back of his belt. That he asked the defendant if he owned a gun of his own, and he said: "No." That the defendant told us, in the presence of Shugart, and the rest of us, that "he bought it (the gun) from a fellow in Kansas; that he also said he did not know the make of the gun; that he had never looked at it to see, and never had it in his hands before that day.

On cross-examination.

By Mr. Tuesburg:

This same witness testified, (Abst. 46.) that the defendant had told him two different stories.

That he had heard Mr. Shugart testify, but "his testimony is not the same as that" * * * That "this is what he had told him, this morning." —i. e. May 18th, 1928). That the defendant also told the latter story, and that he told that to Mr. Kerr and Mr. Shugart. That there have been three stories that he has heard.

People rest.

Ella Henderson being first duly sworn, testified as follows:

Direct examination.

By Mr. Tuesburg:

Ella Henderson called as a witness on behalf of the defense, testified as follows: That she lives at 600 West Ash Street, Fairburg, Illinois; that she knows the defendant, Harice Leroy Carter, and that the co-indicted Livera Word is her sister. That she was one of the four women who went out to the Demoss bridge on the 31st of May, 1928, with the defendant. That there was Leroy Carter and her sister in the front seat, and Lorene McDaniles and Florence Caldwell and herself in the back seat.

That, "as well as she can remember, it was about twenty minutes to three * * * when they started back to Fairburg."

That on their way back to Fairburg they met some men hauling gravel. That she had met James Goff, but she did not "know him." That they had met a wagon driven by James Goff.

That the first wagon was driven along "in the middle of the road." We stopped and he "gee-ed his horses a little in the road. We didn't say anything. Harice Leroy Carter drove around him; almost tipped us in the ditch. That he [fol. 43] drove the car around the right side—West side of the road—of the wagon. That they met another wagon a little farther down the road. That she did not know this man. That when they met that wagon, it was a little farther

over in the right of way than the first wagon, and the first thing the man stood up on his wagon and said: "Drive around." He, (the defendant) Carter, said: "I won't do it; I have the right of way." This man—James D. Churchill—got out of his wagon and looked at the car, then said: "Where is your license number? I will rock your God-damned car." He walked back of the car and picked up some rocks and threw one. He walked a little farther, and hit the car again. Then he went and got on his wagon and threw some more stones. Kept calling us names. My sister climbed out on the right-hand side of the road and walked back; and they both called names." That she heard them very distinctly. The second man (James Goff) called us "God-damned dirty niggers * * * Sons of bitches." And then he began: "You God damn niggers—" My sister said: "You black-hearted bastard."

The Court: "Who said that?"

Witness: "Livera."

That she cannot tell anything else that was said by Churchill, or anyone else.

That they then drove on; that he threw another rock, after we started.

Cross-examination.

By Mr. Kerr:

On cross examination this same witness testified: that Mr. Churchill swore at them, and then Livera swore at them. (Him.) That she did not hear anybody else do any cursing. That she did not hear her sister, Guthrie, swear. That she didn't shake her fist out of the car; that she didn't take any part in the argument. That she did not get out of the car until she got home. That it was true that there were no license plates on the car. That after they left Churchill, there in the road, she went on to Fairburg; that she went home.

That she thinks Florence Caldwell went over next door, to her sister's, to change clothes, and dress; and Lorene went over to the place where she stayed. That Livera and Carter both stayed in the car, while she was there. That she does not know what time it was in the afternoon; that along around four o'clock would be a pretty good guess, she thinks.

That she didn't recognize either of the men who were on the wagons. That she had, she thinks, worked for the Churchill family, in 1906. That she had since lived in Danville, for about four years.

That she had said at the Coroner's Inquest, as well as on direct examination by Mr. Tuesburg, that when they passed the Goff wagon that "there wasn't anybody said anything." That he, Goff, did "gee" his horses, but the second man did not.

That when Churchill asked where the license plates were, he, Carter, said: "It's none of his damned business." That when Carter said that, Churchill said: "By God, I am going to rock your damned car." That Churchill "rocked" the car and kept on rocking it.

[fol. 44] (50) That when he was standing on the ground he went into the ditch and got the rocks. "He had gotten on the wagon" when he threw the stones the second and third times . . . that he continued to throw rocks as long as he thought he could hit the car.

(Interruption.)

Mr. Tuesburg: "Do you know why there were no license plates on the car?

Witness: "For one reason, they hadn't come yet."

Mr. Tuesburg: "How long had your sister had the car?"

Witness: "She got it the 22nd day of May."

Mr. Tuesburg: "She had sent for the license plates?"

Witness: "Yes."

Mr. Tuesburg: "And they hadn't come?"

Witness: "No."

The Court: "Was it a new car?"

Witness: "I don't think so; a second-hand car."

Florence Caldwell, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tuesburg:

Florence Caldwell, called as a witness on behalf of the defense, testified as follows:

That (Abst. 50-51), she lives in Chicago. That she was visiting Fairburg on the 31st of May, 1928. That she went

out to the Demoss bridge with the defendant, Carter, and Livera Word and Ella Henderson and Lorene McDaniels, on that date. That it was 3:30 when they started back. That she remembers the circumstances of meeting two wagons loaded with gravel. That they just drove on by the first wagon; that when they came to the second wagon—"Each demanded the right of way, etc." Nothing was said when we passed the first wagon. The teamster and the driver of the car had these words. Next, the teamster got off his wagon; that the latter said he had the right of way because "he was working on the road." That he then started swearing and throwing rocks. That the teamster called Roy "A black son-of-a-bitch." That the only thing this witness heard Carter say to the teamster—when he demanded to know where his license plates were—was: "It is none of your damned business." That she saw the teamster walk around the car, to the back. It was then that he asked: "What is your number, or where is your license, or something." That she heard the teamster and Livera Word quarrelling; that she got out of the car. That she called him "A black bastard"; that she couldn't hear what the teamster said in reply—as he was farther away from her than Livera Word was.

Cross-examination.

By Mr. Kerr:

[fol. 45] On cross examination, this same witness, Florence Caldwell, testified as follows: That she saw the teamster throw one stone, and then he got back on his wagon and threw some more; that he also threw a handful of gravel after he had gotten back on his wagon, but the first stone he threw from the ground.

That beside the swearing of Livera, she heard the boy call Roy "A black son of a bitch." That none of the other women did any swearing. That she don't remember making a statement at the Coroner's Inquest, to the effect that "Sis Guthrie swore at the teamster. That she really was so excited that she don't remember half of it."

LORENE MCDANIELS, being first duly sworn, testified as follows:

Direct examination.

By Mr. Tuesburg:

Lorene McDaniels, called as a witness on behalf of the defense, testified as follows: That she lives in Fairburg; that she remembers the circumstances of going out to the bridge North of Fairburg on the 31st day of May, 1928, with Florence Caldwell, Livera Word, Ella Henderson and the defendant (Harice Leroy Carter). That, as well as she can remember, they started back to Fairburg "about three o'clock." That she remembers meeting two wagons loaded with gravel, a mile or so South of the bridge. That when they met the first wagon he never said anything; that "they drove in the ditch, to get by."

That, "When they met the second wagon, Carter honked his horn for him to get on "his side of the road"; but he didn't move. Carter stopped the car and this fellow stopped his horses, and he got down off the wagon; that he wanted to know where their license was. Carter said it was "none of his damned business," and told him to get out of the road; and the teamster said he would "rock" the car, and picked up some rocks and threw them. Finally got up on his wagon and threw some more rocks, once he was up there.

Cross-examination.

By Mr. Kerr:

On cross-examination this witness testified as follows: That the teamster picked up "pieces of rock" out of the road, and threw them three times. That she did not say anything; that she never got out of the car; that she never swore at all, nor did she shake her fist out of the car window.

Mr. Tuesburg: "Defendant offers for consideration in this case (alone) the testimony of Livera Word, at the Coroner's Inquest.

The Court: "Admitted." (Abst. 54.)

Defendant Rests.

[fol. 46] S. M. SHUGART, Recalled.

Direct examination.

By Mr. Kerr:

The Court: "You are the same L. M. Shugart that testified this morning?"

Witness: "Yes."

The Court: "Are you acquainted with Livera Word's Chevrolet sedan?"

Witness: "Yes."

The Court: "Did you make an examination of that Chevrolet shortly (after) the 31st day of May?"

Witness: "I did, Sir."

The Court: "When?"

Witness: "The next morning."

The Court: "With a view to ascertaining whether—(were)—any dents in it which could have been caused by (bricks), 'miss-les' or rocks?"

Witness: "Yes."

The Court: "What was the result of your examination?"

Witness: "I found it had no dents in it on the top or back, but the top of the automobile, the back glass, and below the glass had been wiped off, and there was like water from yellow clay on the top and on the back glass."——

Mr. Tuesburg: "How much surface did the part that had been wiped off cover?"

Witness: "It would take about up to the middle of the top, and down to the top, the extra spare tire on the back."

Mr. Tuesburg: "The rear of the car had been wiped off?"

Witness: "Yes."

Mr. Tuesburg: "And it looked like yellow clay where it had been done?"

Witness: "Yes."

Mr. Tuesburg: "The whole back of the car was smeared in the same way?"

Witness: "It looked (it) like yellow clay, or yellow water clay stain."

[fol. 47] Certificate of Transcript of the Testimony taken in the case of:

"People of the State of Illinois

vs.

Harice Leroy Carter, etc., Number 3536

In the Circuit Court of Livingston County, Illinois, before the Honorable Stevens R. Baker, Presiding Judge, et. al., on the 18th day of September, A. D. 1928; that the same is a true and correct copy of the said cause to determine the sentence of the defendant on his plea of guilty, etc. * * *"

Signed by Marjorie Swanson.

Subscribed by Roy C. Hamman, Notary Public, Livingston County, Illinois. September 2, 1944.

[fol. 48] In Supreme Court of Illinois

Petition for Writ of Error

Now comes the Plaintiff in Error, Harice Leroy Carter, etc., and personally represents unto this Honorable Court that these are the following facts and points of authorities in support of his contentions, at this belated date, and within the twenty-year limit as required by the statutes of this State to file writ of error in all criminal cases, as from the Common Law Record. And he does pray this Court to thoroughly review the whole of the record, annexed hereto, in determining whether accused has been properly tried, convicted and sentenced; and whether said accused, Plaintiff in Error, has had a fair trial; and lastly, whether counsel assigned to this case failed to protect defendant's rights—where the Trial Court permitted the District Attorney to take advantage of the defendant because he was poorly represented.

Plaintiff in Error Presents:

1. The Court errored in that it did not appoint an attorney in time to properly aid the defendant during arraignment when accused needed such counsel.

2. Rights of accused in Criminal Prosecution.

Defendant was deprived of due process of law by "abuse of process."

Where defendant was taken in to custody by sheriffs, Chief of Police, State's Attorney and Assistant State's Attorney, and for fourteen or more days after seizure, during which period he was held incommunicado, under secret inquisition, relays of officers, experienced investigators, and from beginning at 6:30 Thursday evening until about 1 A. M. Friday morning, defendant denied that he had anything to do with the killing of Churchill; defendant was carried to another County of the State, Bloomington, Illinois, as a result of mob violence, and on Monday night he was brought back to the County from whence he was recently removed, and lodged in a second-floor cell in the County Jail at Livingston, Illinois; held incommunicado there until the 15th of June, 1928, under said secrect inquisitorial methods and such holding of the accused incommunicado by said officers, in manner aforesaid, constituted "abuse of process"; and, therefore, if any such admissions to State officers were made and submitted as evidence against defendant, they were Not voluntary, and was a denial of "due process of law."

3. Reviewing Court determines whether accused has had a fair trial, and whether conviction is based upon competent evidence, establishing guilt beyond reasonable doubt.

Wherefore, Plaintiff in Error prays Judgment in this Honorable Court (Supreme) of the State of Illinois reversing said cause—at this belated date—on question of lack of competent counsel. And, further, respectfully prays that this Honorable Court will thoroughly review the whole of the records attached hereto, and hereinafter annexed as: Exhibits "A", "B" and "C": and any and all such other records relating to this particular cause as may otherwise remain upon the files of the Clerk of the Circuit Court of Livingston County, Pontiac, Illinois; and that said Clerk be required to furnish a full and true and certified copy of the whole of the records of this cause, No. 3536, should this Court deem it necessary in determining whether the defendant was given a fair and impartial trial.

Respectfully submitted by Harice Leroy Carter,
Plaintiff in Error, Attorney, Pro Se.

[fol. 49] *Duly sworn to by Harice Leroy Carter. Jurat omitted in printing.*

[fols. 50-51] IN SUPREME COURT OF ILLINOIS

No. 28625

PEOPLE STATE OF ILLINOIS, Defendant in Error,

vs.

H. LEROY CARTER, Plaintiff in Error

Error, Circuit Court, Livingston County

ORDER OF SUBMISSION—September 17, 1945

Now on this day come the parties hereto and this being one of the days set apart for the call of the docket under the rules of this Court, and it appearing to the Court that plaintiff in error hath filed herein a duly certified transcript of the record and proceedings of the Court below, together with printed abstracts thereof, and briefs and arguments of counsel in support of the errors assigned herein, and entered motion to reverse the judgment and remand said cause and for costs, and the said defendant in error having entered motion to affirm said judgment and for costs and procedendo, and said motions being taken under advisement for final hearing, and the Clerk of this Court reporting that said cause is now ready to be taken, and said cause is here submitted for the consideration and judgment of the Court:

Therefore it is ordered by the Court that this cause be and the same is hereby taken under advisement.

[fol. 52] IN SUPREME COURT OF ILLINOIS

Docket No. 28625—Agenda 3—September, 1945

THE PEOPLE OF THE STATE OF ILLINOIS, Defendant in Error,

v.

HARICE LEROY CARTER, Plaintiff in Error

OPINION—Filed November 21, 1945

MR. JUSTICE STONE delivered the opinion of the court:

This is a review on writ of error sued out by plaintiff in error *pro se*, seeking reversal of a judgment of the circuit court of Livingston county sentencing him to the peni-

tentiary for 99 years on a charge of murder and his plea of guilty thereon. No bill of exceptions has been filed. The only questions, therefore, that this court can consider are those on the common-law record.

His first contention is that the court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the court appoint one for him. (*People* v. *Braner*, 389 Ill. 190; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Childers*, 386 Ill. 312.) There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot be sustained. *People* v. *Stubblefield*, No. 29048; *People* v. *Stack*, No. 28738; *People* v. *Braner*, 389 Ill. 190.

Others errors assigned relate to his complaint that he was deprived of due process of law by reason of the method of his arrest and that he did not have a fair trial based upon competent evidence. There is no basis in the common-law record on which the court can review such questions. Therefore they cannot be considered. *People* v. *Lantz*, 387 Ill. 72; *People* v. *Bertrand*, 385 Ill. 289; *People* v. *Keller*, 353 Ill. 411.

The judgment of the circuit court of Livingston county is affirmed.

Judgment affirmed.

[fol. 53] IN SUPREME COURT OF ILLINOIS

No. 28625

PEOPLE, STATE OF ILLINOIS, Defendant in Error,

vs.

H. LEROY CARTER, Plaintiff in Error

Error to Circuit Court, Livingston County, 3536

JUDGMENT—November 21, 1945

And now, on this day, this cause having been argued by counsel, and the Court, having diligently examined and inspected as well the record and proceedings aforesaid, as

matters and things therein assigned for error, and now, being sufficiently advised of and concerning the premises for that it appears to the Court now here, that neither in the record and proceedings aforesaid, nor in the rendition of the judgment aforesaid, is there anything erroneous, vicious or defective, and in that record there is no error.

Therefore, it is considered by the Court that the judgment of the Circuit Court of Livingston County aforesaid, Be Affirmed in All Things and Stand in Full Force and Effect, notwithstanding the said matter and things therein assigned for error.

I, Earle Benjamin Searcy, Clerk of the Supreme Court of the State of Illinois and keeper of the records, files and Seal thereof, do hereby certify that the foregoing is a true copy of the final order of the said Supreme Court in the above entitled cause of record in my office.

In Witness Whereof, I have hereunto subscribed my name and affixed the Seal of said court this 7th day of December, 1945.

(S.) Earle Benjamin Searcy, Clerk Supreme Court of the State of Illinois. (Seal.)

[fol. 54] Clerk's Certificate to foregoing transcript omitted in printing.

[fol. 55] SUPREME COURT OF THE UNITED STATES

ORDER GRANTING MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS—May 6, 1946

On Consideration of the motion for leave to proceed *in forma pauperis* herein,

It Is Ordered by this Court that the said motion be, and the same is hereby, granted.

Mr. Justice Jackson took no part in the consideration or decision of this motion.

[fol. 56] SUPREME COURT OF THE UNITED STATES

ORDER ALLOWING CERTIORARI—Filed May 6, 1946

The petition herein for a writ of certiorari to the Supreme Court of the State of Illinois is granted.

And it is further ordered that the duly certified copy of the transcript of the proceedings below which accompanied the petition shall be treated as though filed in response to such writ.

Mr. Justice Jackson took no part in the consideration or decision of this application.

Endorsed on cover: In forma pauperis. Enter Petitioner pro se. File No. 50,467, Illinois Supreme Court. Term No. 764. Harice LeRoy Carter, Petitioner, vs. The People of the State of Illinois. Petition for writ of certiorari. Filed January 21, 1946. Term No. 764 O. T. 1945.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

STEPHEN A. MITCHELL,
Counsel for Petitioner.

WILLIAM I. CONWAY,
SHERLOCK J. HARTNETT,
of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

BRIEF FOR PETITIONER

This case is before the Court on writ of certiorari granted May 6, 1946 (R. 6) to review a judgment of the Supreme Court of Illinois (R. 44), affirming a judgment of the Circuit Court of Livingston County, Illinois, convicting the Petitioner on June 15, 1928, of the crime of murder, on a plea of guilty, and sentencing him on June 29, 1928, to imprisonment for 99 years (R. 8-12).

Opinion Below

The Supreme Court of Illinois rendered an opinion (R. 43, 44), 391 Ill. 594; 63 N. E. 2nd 763; as follows:

> "This is a review on writ of error sued out by plaintiff in error *pro se*, seeking reversal of a judgment

of the Circuit Court of Livingston County sentencing him to the penitentiary for 99 years on a charge of murder and his plea of guilty thereon. No bill of exceptions has been filed. The only questions, therefore, that this Court can consider are those on the common-law record.

"His first contention is that the Court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the Court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the Court appoint one for him. (*People* v. *Braner*, 389 Ill. 190; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Childers*, 386 Ill. 312). There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot be sustained. *People* v. *Stubblefield*, No. 29048; *People* v. *Stack*, No. 28738; *People* v. *Braner*, 389 Ill. 190.

"Other errors assigned relate to his complaint that he was deprived of due process of law by reason of the method of his arrest and that he did not have a fair trial based upon competent evidence. There is no basis in the common-law record on which the Court can review such questions. Therefore they cannot be considered. *People* v. *Lantz*, 387 Ill. 72; *People* v. *Bertrand*, 385 Ill. 289; *People* v. *Keller*, 353 Ill. 411.

"The judgment of the Circuit Court of Livingston County is affirmed.

Judgment affirmed."

Jurisdiction

The jurisdiction of this Court is invoked under section 237 (b) of the Judicial Code.

Constitutional Provisions Involved

The Fourteenth Amendment to the United States Constitution provides in part:

> "• • • nor shall any State deprive any person of life, liberty, or property, without due process of law; • • •."

Questions Presented

The petitioner claims that he is imprisoned in violation of the Fourteenth Amendment to the United States Constitution. He is now imprisoned in the Illinois State Penitentiary, where he was committed pursuant to a judgment and sentence of the Circuit Court of Livingston County, Illinois, on June 29, 1928, for a term of ninety-nine years. On Writ of Error, the judgment of the trial Court was affirmed by the Supreme Court of Illinois on November 21, 1945. The following questions are presented:

1. Whether the petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial;

2. Whether the petitioner was denied the benefit of an effective appointment of counsel;

3. Whether petitioner, being charged with a capital crime, was entitled to counsel at every step of the proceedings against him;

4. Whether petitioner's plea of guilty and his failure to claim and demand aid of counsel, amounted to an intelligent and competent waiver of counsel;

5. Whether under the circumstances in this capital case, the absence of a determination on the record by the trial Court that there was a competent and intelligent waiver by this petitioner, disposes of any contention that there was a proper waiver in this case.

Statement of the Case

Petitioner asserts that the trial Court did not appoint counsel to advise and assist petitioner before and during arraignment; that he was held *incommunicado* for fourteen (14) days from the time of his arrest until arraignment on June 15, 1928; that he was subjected to secret inquisition by relays of officers and investigators during this "incommunicado period"; that petitioner was moved from one county to another during this period because of mob violence. (Petition for Writ of Error, R. 41-42).

James Churchill was killed by gunfire on May 31, 1928 (R. 3). The homicide occurred in the course of an affray with the petitioner and Livera Word, a colored woman (R. 16, 20). The actual killing followed about twenty minutes (R. 17) after an altercation witnessed or participated in by three other colored women as well as Livera Word and the Petitioner (R. 16, 18, 19, 36, 38, 39).

The circumstances as shown by the testimony at the hearing on the question of mitigation or aggravation, were these: On May 31, 1928, petitioner went fishing with four women and a young boy, the son of one of the women (R. 24). Petitioner drove to a stream near Fairburg, Illinois, in a second-hand Chevrolet Sedan owned by Livera Word, one of the women. It had no license plates (R. 37). In mid-afternoon, the four women and petitioner started back to Fairburg, driving South on a North South Road which had two tracks. One track was a bad, very rough and rutty road on the East side, and the other was a good road, a beaten track, on the West side (R. 15, 17). While driving South on his right side of the road—being the beaten track on the West side—petitioner's progress was blocked when he met two horse-drawn wagons loaded with gravel and traveling North in the beaten track on their left side of the road (R. 17).

Although the beaten track was wide enough for two cars to pass (R. 17), petitioner had to nearly get off the road on the right side to pass the first wagon driven by James Goff (R. 18) and almost tipped into the ditch (R. 35, 39), although Goff "gee-ed" his horses a little from the middle of the road (R. 35, 37).

The petitioner then met Churchill's wagon which was a little farther over in the right of way (R. 35, 36). Churchill stood up on his wagon and told the petitioner to drive around but the petitioner refused and stopped in front of Churchill's horses (R. 16, 17, 36, 38, 39). Churchill got off his wagon (R. 16, 36, 38, 39) and looked at the front and rear of the car for license plates and tried to open the hood of the car to see if it was a stolen car (R. 16, 18, 36).

There was an argument between Churchill and the petitioner and Livera Word as to the right of way and the license plates (R. 16, 36, 37). Churchill started swearing and throwing rocks from the ditch and called the petitioner a "black son of a bitch" (R. 36, 38, 39). Livera Word got out of the car and called Churchill a "black bastard" or "a black-hearted bastard" (R. 36, 38). Churchill got back on his wagon and threw more rocks and gravel on the car as he pulled around it and continued to throw rocks as long as he thought he could hit the car (R. 16, 36, 37, 38, 39). Livera Word and two of the other women got out of the car and called Churchill a "yellow son of a bitch" and "a God damned white son of a bitch" (R. 16, 36, 38) and Churchill kept calling them names (R. 16, 36, 38). Goff, the other teamster, call them "God damned dirty niggers • • • sons of bitches" (R. 36). Churchill's final remark was "Well, I am not a nigger, anyway" (R. 25).

The County Sheriff testified that the top and back of the car showed no dents but the middle of the top and down

the back had been wiped off and looked like yellow clay had been smeared there (R. 40).

Churchill and Goff drove on a mile or so during the immediately following twenty minutes or more (R. 17) before the petitioner and Livera Word returned in her car. The dispute over the right-of-way and the throwing of gravel was resumed when petitioner blew his horn—Churchill refused to move over and again stopped his team (R. 16, 19). Goff and Churchill got off their wagons at the same time (R. 20). Goff testified that Churchill took a couple of steps from his wagon toward the car and the petitioner shoved himself out from under the wheel of the car, took two steps sideways and fired at Churchill; that he didn't sight, and shot very fast three times; that Churchill was shot once thru the heart (R. 16, 20, 21). Churchill was about five feet six inches tall and Goff stood six feet two inches (R. 20), but the petitioner's stature does not appear.

Petitioner was taken into custody in the same evening and was questioned by the States Attorney, Assistant States Attorney, Chief of Police, Sheriff and Deputy Sheriff. Livera Word was brought before the petitioner at one stage of the questioning (R. 29). No stenographer was present but the Sheriff made pencil notations (R. 30). These officers gave petitioner a "hearing" about three o'clock in the morning (R. 34). Later they continued questioning the petitioner as he sat in the back seat of a car on the way to Bloomington (an adjoining county seat) (R. 34) where the petitioner alleges he was taken as a result of mob violence (R. 42). The Chief of Police testified that the petitioner told him during the ride to Bloomington that one word fetched on another and Churchill got off his wagon, and he got out of the car and that he shot when Churchill put his hand up as though he was going into his shirt for a gun (R. 34).

Petitioner was taken in custody on May 31, 1928. On June 12, 1928 (R. 8), he was indicted for the murder of Churchill (R. 2-8). On June 15, 1928, the petitioner was, without benefit of counsel, arraigned and entered a plea of guilty and was immediately convicted by the Circuit Court of Livingston County (R. 8-9).

Upon further hearing on June 15, 1928, the trial Court appointed L. W. Tuesburg, a member of its Bar, to represent the petitioner upon the "question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty", and set a hearing on the question of mitigation or aggravation for June 18, 1928 (R. 9). On June 18, 1928, the trial Court heard evidence on the question of mitigation or aggravation and took "said matter of mitigation or aggravation of the said offense under advisement" (R. 9-10). On June 29, 1928, the petitioner appeared in Court without Mr. Tuesburg and was sentenced to a term of 99 years (R. 10-12).

The judgment of conviction (R. 8), states that petitioner was furnished with a copy of the indictment at the time of arraignment and expressed a desire to plead guilty to the crime of murder as charged; that

> "Thereupon the Court fully explained to the defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to trial before a jury of twelve (12) jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice LeRoy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment" (R. 8, 9).

At the time of arraignment the petitioner was thirty years of age, having been born on June 8, 1898 (R. 13). The trial judge and State's Attorney certified (R. 14) to the pentitentiary officials that the petitioner had no schooling, but could read and write, was of quiet disposition, and average mentality, and had not been in trouble before during three years residence in the County; that he was industrious, having worked eight years for Industrial Track Construction Co., St. Louis, Missouri, and during the previous three years at Ballard and Johnson's Restaurant at Forrest, Illinois; that his occupation was chauffeur, mechanic, cook (R. 13-14). The petitioner is a negro (R. 15).

The Supreme Court of Illinois on March 22, 1945, granted leave to Petitioner to proceed in *forma pauperis* and his petition for Writ of Error was taken under advisement by that Court on September 17, 1945 (R. 1, 43). The trial Court's judgment was affirmed on November 21, 1945, pursuant to opinion filed on that day (R. 43-45).

On May 6, 1946, this Court granted petitioner's motion for leave to proceed in *forma pauperis*, and allowed certiorari (R. 45, 46). On June 10, 1946, this Court appointed the undersigned as counsel for the petitioner.

Argument

I

The petitioner was denied the right of counsel, with the accustomed incidents of consultation and opportunity of preparation for trial; there was no effective appointment of counsel.

A. Introductory

This is a capital case. It is our contention that petitioner's imprisonment is unlawful under the Fourteenth Amendment of the United States Constitution. That contention

rests upon cases decided by this Court, upon the principles enunciated in them and upon the "immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard". *Holden* v. *Hardy*, 169 U. S. 366, 389; *Powell* v. *Alabama*, 287 U. S. 45, 68, 71, 72.

We make two points. First, the petitioner was denied the right of counsel with the customary incidents of that right; there was no effective appointment of counsel. Second, the petitioner's plea of guilty and his failure to assert and demand his right to counsel did not amount to a competent and intelligent waiver of his right to counsel.

Upon arraignment and without benefit of counsel, the petitioner pleaded guilty of murder. The statutory punishment was death by electrocution or imprisonment for any period from fourteen years to life. He was sentenced to a term of ninety-nine years. The almost simultaneous arraignment, plea and conviction occurred three days after indictment and fifteen days after the homicide and petitioner's arrest. The petitioner was not furnished a copy of the indictment until his arraignment. He had no schooling. He was quiet and industrious and had worked as a cook and mechanic for three years prior to conviction. He was thirty years old and had not been in trouble before. These facts appear in the trial Court's judgment and in the Information certified to the penitentiary officials by the trial judge and States Attorney.

Allegations and testimony as to the provocative circumstances leading up to the alleged homicide and his claim of self-defense, as to the holding of the petitioner *incommunicado* and his transfer before arraignment from one county to another as a result of mob violence, appear only in his petition and transcript of testimony. These circumstances have been described in the Statement of the Case,

supra. The transcript was not certified by the trial judge and the State and no Bill of Exceptions was filed.

After petitioner's plea had been received and judgment of conviction had been entered, the Trial Court held a further hearing, also on June 15, 1928. The Court then appointed L. W. Tuesburg, an attorney, "to represent the said defendant Harice LeRoy Carter, commonly known as Roy Carter on question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty and which said question of mitigation or aggravation of said murder is hereby set down for hearing * * *" (R. 9). This hearing was held three days later and on June 29, 1928, the defendant appeared without counsel and was sentenced.

The earlier opinions of this Court and the principles applied to them are considered to be controlling of the issues here presented. Therefore we do not make extended references to the historical background of the Fourteenth Amendment and of the rule of criminal procedure which guarantees petitioner's inherent right to have had counsel appointed.

B. Controlling Decisions in This Court

The petitioner's case falls squarely within this Court's decisions in *Tompkins* v. *Missouri,* 323 U. S. 485, and *Rice* v. *Olson,* 324 U. S. 786, and within the principles laid down in every decision of this Court bearing upon the issues at Bar, beginning with *Hebert* v. *Louisiana,* 272 U. S. 312, and *Patton* v. *U. S.,* 281 U. S. 276, and continuing thru *Canizio* v. *New York,* decided February 4, 1946, 327 U. S. 82.

Tompkins alleged in a petition filed in 1944 (*Tompkins* v. *Missouri,* 323 U. S. 485) that he was charged in 1934 with murder in the first degree, pleaded guilty and was con-

victed and sentenced for a life term; that he was not represented by counsel, was ignorant of his right to demand counsel in his behalf, was incapable adequately of making his own defense, and did not waive his Constitutional right to the aid of counsel. In reversing the Missouri Supreme Court, this Court said (p. 487, 488, 489):

> "*Powell* v. *Alabama*, 287 U. S. 45, 71, held that at least in capital cases 'where the defendant is unable to employ counsel, and is incapable adequately of making his own defense because of ignorance, feeblemindedness, illiteracy, or the like, *it is the duty of the Court, whether requested or not,* to assign counsel for him as a necessary requisite of due process of law'. Under that test, *a request for counsel is not necessary.* One must be assigned to the accused if he is unable to employ one and is incapable adequately of making his own defense * * * One who was not represented by counsel, who did not waive his right to counsel and who was ignorant of his right to demand counsel, is one of the class which the rule of *Powell* v. *Alabama* was designed to protect * * *."
>
> "The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. * * * The punishments for the offenses are different. * * * The differences between them are governed by rules of construction meaningful to those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. *The guiding hand of counsel is needed* lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed." (Italics added.)

Williams v. *Kaiser*, 323 U. S. 471, is a companion to the *Tompkins* case, the only distinction being that Williams alleged that he had requested the aid of counsel prior to pleading guilty and being convicted. Williams also was charged with a capital offense—robbery with a deadly weapon. This decision emphasizes the importance of the distinctions between degrees of robbery and larceny and of technical requirements relating to evidence, instructions, and offenses. The complexities were stated to be: "a closed book to the average layman," (page 475) and to emphasize the actualities of the necessity for counsel in connection with a plea as well as in the conduct of a trial.

The same principles were applied in a non-capital case of an Indian who had pleaded guilty, without benefit of counsel, to a charge of burglary in a Nebraska State Court. *Rice* v. *Olson*, 324 U. S. 786. He alleged that he was ignorant of the law, although the burglary statute was read to him, and of his Constitutional rights to counsel, and also asserted that the alleged crime was committed on an Indian Reservation which was exclusively within Federal Jurisdiction. Holding that a plea of guilty was not a waiver in that case this Court ruled (page 788) that the technical problems involved in the issues in the case, emphasized the petitioner's need for counsel of experience and skill.

We submit that a result identical with the reversals in the *Tompkins*, *Williams*, and *Rice* cases, *supra*, would have been reached in *Canizio* v. *New York*, 327 U. S. 82, but for two important differences in fact. First, Canizio did not plead guilty to a capital offense; second, after Canizio had pleaded guilty to a non-capital offense, an attorney entered a general appearance in the case and represented him actively in long hearings during the day of sentence. The Court's opinion concluded that this attorney could have moved to withdraw the plea of guilty and that the trial court

would have had the power to set aside the plea and let the petitioner stand trial; that petitioner actually had the benefit of counsel. Quite aside from the question of the timeliness of the appearance of Canizio's counsel it appears that the petitioner was able to and did employ counsel who filed a general, rather than a restricted appearance, and that Canizio did not plead guilty to a capital offense.

The "fundamental" character of this petitioner's right under the Fourteenth Amendment cannot be disputed. This Court has declared repeatedly and with the greatest emphasis that the right of a citizen to the aid of counsel is "fundamental". *Hebert* v. *Louisiana*, 272 U. S. 312, 316, 317, says:

> "The due process clause in the Fourteenth Amendment does not take up the statutes of the several states and make them the test of what it requires; nor does it enable the Court to revise the decisions of the State Courts on questions of State law. What it does require is that State action, whether thru one agency or another, shall be consistent with the fundamental principles of liberty and justice which lie at the base of all our civil and political institutions and not infrequently are designated as 'law of the land'. Those principles are applicable alike in all the States and do not depend upon or vary with local legislation."

Explaining the rationale for this fundamental right of aid to counsel, this Court said in *Powell* v. *Alabama*, 287 U. S. 45, 69:

> "Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with the crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel, he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue

or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If that be true of men of intelligence, how much more true it is of the ignorant and illiterate, or those of feeble intellect." (Italics added.)

See also *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-244;
Glasser v. *U. S.*, 315 U. S. 60, 70, 76;
Avery v. *Alabama*, 308 U. S. 444;
Smith v. *O'Grady*, 312 U. S. 329;
Betts v. *Brady*, 316 U. S. 455;
Williams v. *Kaiser*, 323 U. S. 471, 475.

(Controlling cases upon the question of waiver are presented under Point II of this Argument.)

C. A Citizen Charged With a Capital Crime is Entitled to Counsel at Every Step of the Proceedings Against Him.

The petitioner, a negro cook with no schooling, had been confined and harried about for fifteen days before arraignment. His need for counsel during this period and prior to pleading was extreme. He should have had confidential conferences with a competent attorney so that he might understand his plight and the alternative courses that were open to him. Under the circumstances, a patient and intelligent legal advisor was essential if this petitioner was to comprehend even the simpler general aspects of his situation and of the courses he might follow. Prompt and thorough investigation of the facts and a careful search for witnesses was imperative before an intelligent decision could be made not only as to the extent of provocation and right to a plea of self-defense, but also as to the possibility that local

prejudice and tension might justify a change of venue or a postponement.

It is not enough that counsel be appointed—the appointment must be effective. And to be effective, it must be timely. In *Williams* v. *Kaiser*, 323 U. S. 471, 475, this Court reviewed the considerations that require the appointment of counsel in a capital case, and said:

> "Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial".

The petitioner needed and was entitled to the "guiding hand of counsel at every step in the proceedings against him". *Powell* v. *Alabama*, 287 U. S. 45, 69. This "guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed". *Tompkins* v. *Missouri*, 323 U. S. 485, 488.

The critical period for the petitioner was the time prior to and during his arraignment. These were "steps in the proceeding against him". When his need was greatest, he was denied the "guiding hand of counsel". The critical nature of the early stages in such a proceeding was recognized in *Powell* v. *Alabama*, 287 U. S. 45, 57:

> "• • • during perhaps the most critical period of the proceedings against these defendants, that is to say, from the time of their arraignment until the beginning of their trial, when consultation, thorough going investigation and preparation were vitally important, the defendants did not have the aid of counsel in any real sense, although they were as much entitled to such aid during that period as at the trial itself."

These decisions recognize the actualities that face an ignorant and indigent citizen who is charged with a capital

crime. His need for help is not met and his undoubted rights are not protected by a routine general statement of his rights to counsel and jury trial, given from the elevation of the bench by a trial judge. This routine is meaningless for all practical purposes when the citizen has already "expressed" a desire to plead guilty. An unschooled and simple man, more than one experienced in distinctions and technicalities, might readily be held back from making a request for counsel and a jury trial when he has already expressed a desire to plead guilty. This could easily appear to him to be a fatal inconsistency for he might say to himself "How can I ask to have a lawyer and a trial since I have already told this judge, who will try the case, that I plead guilty".

Such a man does not plead guilty to "the crime of murder as charged in the indictment". He pleads guilty to an *act* (*Evans* v. *Rives*, 126 Fed. 2nd 633) without any realization that this act may well have been manslaughter or assault with a deadly weapon. The only realistic course in such a case is to appoint counsel. To be effective, this appointment must be timely; that is, the need of counsel must be met before an affirmative step is taken by the defendant. For these reasons,[1] this Court has declared repeatedly that

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[1] In addition to the Controlling Decisions set out in Argument, supra, see the authorities cited in Petitioner's Brief (pages 27-30) under the heading "Modern Authorities Generally Support the Right of an Accused to Counsel Prior to Arraignment", in *Walker* v. *Johnston*, 312 U. S. 275, No. 173, October term, 1940, Supreme Court of the United States.

A review of the provisions of the Constitution of the thirteen original States concerning the right to counsel, and other historical references are set out in *Betts* v. *Brady*, 316 U. S. 455, 465-471.

Note 2 and the Appendix thereto of the dissenting opinion in *Betts* v. *Brady*, 316 U. S. 455, 477-480 is an exhaustive summary and review of the State Statutes and citations pertaining to:

1. States which require that indigent defendants in non-capital as well as capital criminal cases be provided with counsel on request.

2. States which are without Constitutional provisions, or judicial decisions clearly establishing this requirement.

citizens are entitled, in State as well as Federal Courts, to the aid of counsel "At every step in the proceedings".

D. The Gravity of the Charge and the Intricacies of the Defense Emphasize Petitioner's Need for Counsel.

The five-page indictment in this case must have appeared to this petitioner and most laymen, to have been an involved document filled with repetitions, circumlocution and ambiguity. Yet the petitioner—who had no schooling—was handed a copy of the indictment only upon his arraignment and then was asked to plead. If he had both the time and ability to read the document he could not have made out much more than that it accused him with Livera Word of killing James Churchill. Surely he could not be expected to cope with the complexities of the Illinois Statutes and decisions and the distinctions that they make between murder, manslaughter, assault with a deadly weapon, and the lesser degrees of assault.

Standing at the Bar upon arraignment, the petitioner could hardly be expected to grasp that the documents just handed to him, while charging him with murder, would have supported a conviction, on a plea of not guilty, of one of several lesser crimes carrying diminishing amounts of punishment in relation to the gravity of the offenses.[2]

---

3. States in which dicta of judicial opinion are in harmony with the decisions by the Court below in *Betts* v. *Brady, supra.*

4. States in which the requirement of counsel for indigent defendants in non-capital cases has been affirmatively rejected.

[2] Under this indictment for murder, the petitioner could have been convicted of manslaughter or any lesser degree of homicide, *People* v. *Lewis*, 375 Ill. 330, 31 N. E. 2 (d) 795 (1941) or felonious assault, *People* v. *Dugas*, 310 Ill. 291, 141 N. E. 769 (1923). In *People* v. *Lewis, supra*, the indictment charged that the accused "unlawfully, feloniously, wilfully and of his malice aforethought killed and murdered—contrary to the statute—". (375 Ill. 330, 331) A conviction of manslaughter was sustained by the Illinois Court saying, "The common factor and the essential element which constitutes a crime—is the unlawful killing of a human

Counsel was needed to consider and advise with the petitioner concerning the presence or absence of express or implied malice, and the extent of the provocation given by the deceased; he was needed to weigh the availability of a plea of self-defense. Counsel's advice was indispensable to an intelligent decision by the accused as to pleading guilty to the crime of murder, or manslaughter or of a lesser offense and in choosing or waiving a jury trial. The fact that petitioner had never seen the deceased before the fatal encounter (R. 31) would be weighed by his counsel along with the additional facts developed in the course of a careful investigation of the facts and interrogation of the numerous witnesses.

The intricacy and complexity of the problems and the difficulties and the possibly fatal importance of his unaided

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being." (375 Ill. 330, 333) "• • • when an indictment for a higher crime embraces all the elements of an offense of an inferior degree, the jury may discharge the accused of the higher crime and convict him of the lower • • •" (375 Ill. 330, 334).

In *People* v. *Dugas, supra,* the accused was indicted, tried and convicted of assault with the intent to kill. A motion for a new trial was denied. After this trial, the victim of the assault died and the accused was indicted, tried and acquitted of murder. The motion for new trial in the assault case was revived and again denied; on appeal the Illinois Supreme Court reversed the denial saying:

> "The acquittal of the plaintiff in error on the indictment which charged him with murder acquitted him of every charge included in this crime. If it (the murder acquittal) had occurred before his trial on the indictment for the assault the judgment would have been admissible on that trial as evidence of a previous acquittal • • •. Under an indictment for murder by means of a felonious assault the defendant may be convicted of any lower degree of crime embraced within the charge of murder made in the indictment." (310 Ill. 291, 300).

The provision of the Illinois Constitution, relating to rights of accused in criminal prosecutions, and the Illinois Statutes relating to Homicide are set out in the Appendix. By these Statutes "Murder" is defined as the unlawful killing of a human being with either express or implied malice; "Manslaughter" as unlawful killing of a human being without malice. "Manslaughter" is further divided in two classifications

choice of procedure, at the time of and before arraignment bring this case squarely within the decisions of this Court in decided cases. This Court has recognized:

> "• • • the obvious truth that the average defendant does not have the professional legal skill to protect himself when brought before a tribunal with power to take his life or liberty • • •. That which is simple, orderly and necessary to the lawyer, to the untrained layman, may appear intricate, complex and mysterious". *Johnson* v. *Zerbst*, 304 U. S. 458, 462, 463.

In the case at Bar, as well as in *Williams* v. *Kaiser*, 323 U. S. 471, 475, 476:

> "Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman • • • needs the aid of counsel lest he be the victim of over-zealous prosecutors, of the law's complexity, or of his own ignorance or bewilderment. These are reasons why the right to counsel is 'fundamental'. *Powell* v. *Alabama*, 287 U. S. 45, 70; *Grosjean* v. *American Press Co.*, 297 U. S. 233, 243-44; *Avery* v. *Alabama*, 308 U. S. 444, 447".

This petitioner is in the identical posture described in *Tompkins* v. *Missouri*, 323 U. S. 485, 488, 489:

> "The nature of the charge emphasizes the need for counsel. Under Missouri law, one charged with murder in the first degree may be found guilty of that offense, of murder in the second degree, or of manslaughter. • • • The punishments for the offenses are different. • • • The differences between them are governed by rules of construction meaningful to

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viz: "Voluntary Manslaughter" being the killing of a human being as the result of an irresistible passion and "Involuntary Manslaughter" being a killing resulting from the commission of a lawful or unlawful act, the performance of which would not ordinarily cause the loss of life.

"Self-Defense" is specifically stated to be a valid defense for homicide. (*see Appendix*).

those trained in the law, but unknown to the average layman. The defenses cover a wide range. And the ingredients of the crime of murder in the first degree as distinguished from the lesser offenses are not simple but ones over which skilled judges and practitioners have disagreements. The guiding hand of counsel is needed lest the unwary concede that which only bewilderment or ignorance could justify or pay a penalty which is greater than the law of the State exacts for the offense which they in fact and in law committed."

E. The Appointment of Mr. Tuesburg Was an Admission of Petitioner's Ignorance and Indigence; This Appointment Was Limited to a Special Hearing and Did Not Constitute a General Appearance for Petitioner.

After petitioner's plea of guilty had been accepted, judgment of conviction was entered immediately. At a later hearing on the same day the trial judge appointed L. W. Tuesburg, a member of the Bar, to appear for the petitioner on a hearing on the "question of mitigation or aggravation of said crime of murder to which said defendant has pleaded guilty" (R. 9). The restricted nature of the appointment is made especially clear by the repetition in both the judgment of conviction and in the judgment imposing sentence (R. 10-12) of the phrase "question of mitigation or aggravation".

But the appointment of Mr. Tuesburg is significant. It supports—if it does not compel—the conclusion that the trial judge realized that the petitioner was helpless.

The petitioner does not urge that his rights were invaded by the appointment of Mr. Tuesburg after he had pleaded guilty and had been convicted of murder without the aid of counsel. Instead the petitioner welcomes—then as now—all the legal assistance he can get, however far short it may fall from providing him with due process of law.

The entrance of Mr. Tuesburg into the case was for the special purpose of complying with the Illinois Statute (*Ill. Rev. Stat.* 1945 CH 38, par. 732) reading as follows:

> "In cases where the party pleads 'guilty', such plea shall not be entered until the Court shall have fully explained to the accused the consequence of entering such plea; after which, if the party persist in pleading 'guilty', such plea shall be received and recorded, and the Court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury. In all cases where the Court possesses any discretion as to the extent of the punishment, it shall be *the duty of the Court to examine witnesses as to the aggravation and mitigation of the offense.*" (Italics added.)

Under this statute, this "hearing" was mandatory, but it was not a "trial" in the ordinary sense. *People* v. *Popescue*, 345 Ill. 142, 177 N. E. 739; *People* v. *McWilliams*, 348 Ill. 333, 180 N. E. 832.

The purpose of the appointment may have been to assist the Court, in performing "the duty of the Court to examine witnesses". Regardless of motivation, the appointment was made for a specifically limited purpose and did not cure the damage that the petitioner had suffered by a denial of the aid of counsel in the earlier stages of the proceedings.

F. In This Capital Case the Totality of the Facts and Circumstances Required an Effective Appointment of Counsel Before Acceptance of a Plea of Guilty.

There is a striking contrast between the ignorance and indigence of the petitioner at Bar and the education, experience and presumed financial resources of the relator, one McCann, in *Adams* v. *U. S.*, 317 U. S. 269. Although McCann's rights to counsel and jury trial were not found

to have been denied in that case, the opinion states the general rule, pages 275, 276:

> "Certain safeguards are essential to criminal justice. • • • The accused must have ample opportunity to meet the case of the prosecution. To that end, the Sixth Amendment of the Constitution abolished the rigors of the common law by affording one charged with a crime, the assistance of counsel for his defense. Such assistance 'in the particular situation' of 'ignorant defendants in a capital case' led to recognition that 'the benefit of counsel was essential to the substance of a hearing', as guaranteed by the Due Process Clause of the Fourteenth Amendment, in criminal prosecutions in State Courts. *Palko* v. *Conn.*, 302 U. S. 319, 327".

Again, while finding that there was not a denial of due process by the refusal of a State Court to appoint counsel in the non-capital case before it, this Court held in *Betts* v. *Brady*, 316 U. S. 455, 462:

> "Asserted denial is to be tested by an appraisal of the totality of facts in a given case. That which may, in one setting, constitute a denial of fundamental fairness, shocking to the universal sense of justice, may, in other circumstances, and in the light of other considerations, fall short of such denial."

In the *Betts* case, the accused was considered by a majority of the Court not to be helpless but possessed of sufficient ability to protect himself on a trial of a narrow issue presented by an alibi. So also in *Avery* v. *Alabama*, 308 U. S. 444, all the facts and witnesses relating to a possible legal defense of insanity were available to counsel.

But this petitioner was obviously incapable, without aid of counsel, of protecting himself against a capital charge. Even a proper marshaling of the facts was beyond his wit and circumstance—just as the intricacies and complexities of his legal defenses were outside his ken. Here there was a

connected series of altercations participated in by at least seven people and covering a period of twenty minutes or more. While eight witnesses were known to be in the vicinity—two teamsters, two fishermen and four women (R. 17, 21, 24), other persons may have been witness to part or all of the affray. At least the transcript does not show what became of the young colored boy who went fishing with the petitioner and the four women (R. 24), and presumably, he was still near the scene when the petitioner and Livera Word returned. And, the testimony of Chester Herndon, suggests that there may have been other witnesses. He said, "He might have heard the shots but he didn't pay any attention; that there is so much shooting down that way—by hunters and fishermen and loafers. That if he had heard any shooting he would not have paid any attention" (R. 22).

Here there was a clear and compelling need for counsel to investigate and weigh the facts, to advise with the petitioner as to his plea, and to direct his defense. As this Court said in *Glasser* v. *U. S.*, 315 U. S. 60, 76:

> "The right to have the assistance of counsel is too fundamental and absolute to allow Courts to indulge in nice calculations as to the amount of prejudice arising from its denial".

II

Neither his plea of guilty nor his failure to claim and demand aid of counsel, amounted to an intelligent and competent waiver of counsel by this petitioner.

A. Controlling Decisions in This Court

The question of a purported waiver of the Constitutional right to the aid of counsel is not new in this Court. A number of cases have turned upon whether or not in a given set of

circumstances, a plea of guilty, or an affirmative action or declaration, constituted an effective waiver of the right to counsel or to a jury trial.

"Waiver" was defined in *Johnson* v. *Zerbst*, 304, U. S. 458, 464:

> "A waiver is ordinarily an intentional relinquishment or abandonment of a known right or privilege. The determination of whether there has been an intelligent waiver of the right to counsel must depend, in each case, upon the particular facts and circumstances surrounding that case, including the background, experience and conduct of the accused."

Again, in holding that an effective waiver of counsel had been made by a defendant who had refused to employ or accept the appointment of counsel, asserting that while he was not a lawyer, he had studied law and considered himself competent to handle his own defense, this Court said in *Adams* v. *U. S.*, 317 U. S. 269, 277-279:

> "The question in each case is whether the accused was competent to exercise an intelligent, informed, judgment—and for determination of this question, it is of course relevant whether he had the advice of counsel. * * * And whether or not there is an intelligent, competent, self-protecting waiver of jury trial by an accused, must depend upon the unique circumstances of each case. * * * He may waive his Constitutional right to assistance of counsel if he knows what he is doing and his choice is made with eyes open. *Johnson* v. *Zerbst*, 304 U. S. 458, 468-69."

It is the duty of the trial judge to determine whether there has been an express and intelligent waiver of a Constitutional right. This duty increases with the gravity of the offense and "is not to be discharged as a mere matter of rote". *Patton* v. *United States*, 281 U. S. 276, 312.

In case of a proper waiver of a Constitutional right by an accused who is without counsel, and whose life or liberty is

at stake, *the record should show* whether the trial Judge has determined that the accused has made an intelligent, competent and affirmative waiver. *Patton* v. *United States, supra; Johnson* v. *Zerbst,* 304 U. S. 458, 465; *Walker* v. *Johnston,* 312 U. S. 275, 286.

A plea of guilty is not, of itself, a waiver of the right to counsel.

Rice v. *Olson,* 324 U. S. 786, 788;
Tompkins v. *Missouri,* 323 U. S. 485, 488;
Walker v. *Johnston,* 312 U. S. 275, 286;
Smith v. *O'Grady,* 312 U. S. 329, 334;
Frame v. *Hudspeth,* 309 U. S. 632, reversing *Frame* v. *Hudspeth,* 109 F. (2d) 356 with agreement of Solicitor General;
Evans v. *Rives,* 126 F. (2d) 633.

B. Under the Circumstances, a Plea of Guilty to a Charge of Murder Was Not a Waiver of the Right to Aid of Counsel.

Any contention that the plea of guilty entered in this case constitutes a waiver of the petitioner's right to counsel, would fly in the face of the decisions of this Court. In *Rice* v. *Olson,* 324 U. S. 786, 788, 789 the opinion reads:

> "*A defendant who pleads guilty is entitled to the benefit of counsel, and a request for counsel is not necessary.* It is enough that a defendant charged with an offense of this character is incapable adequately of making his defense, that he is unable to get counsel, and that he does not intelligently and understandingly waive counsel. Whether all these conditions exist is a matter which must be determined by evidence where the facts are in dispute." (Italics added.)

A plea of guilty by the accused in *Tompkins* v. *Missouri,* 323 U. S. 485, 488 was not considered to be a waiver. In that case and in *Rice* v. *Olson, supra,* and in the case at Bar,

no request was made for the appointment of counsel. To the same effect was *Walker* v. *Johnston*, 312 U. S. 275, 286; *Smith* v. *O'Grady*, 312 U. S. 329, 334; *Frame* v. *Hudspeth*, 309 U. S. 632 (reversing *Frame* v. *Hudspeth*, 109 F. (2d) 356); *Evans* v. *Rives*, 126 F. (2d) 633.

Petitioner's plea of guilty, under the circumstances here, merely emphasizes his need of counsel.

C. The Failure of This Petitioner to Take Affirmative Action in Order to Obtain Counsel, Was Not an Express and Intelligent Consent to the Loss of His Constitutional Rights. Petitioner Did Not Affirmatively Waive His Federal Right to Counsel.

This petitioner made no affirmative waiver of his rights. Instead, (after he had pleaded guilty) he merely failed to take affirmative action claiming his right to counsel. Under the Illinois Statute and Decisions [3] he was required to do two things in order to obtain counsel: first, make a request and second, make an oath that he was unable to procure

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[3] The Illinois Statute in effect in 1928, at the time of petitioner's arraignment and conviction reads: (*Ill. Rev. Stat.* 1927, chap. 38, par. 754);

> "Every person *charged with crime* shall be allowed counsel, and when he shall state upon oath that he is unable to procure counsel, the Court shall assign him competent counsel, who shall conduct his defense. In all cases, counsel shall have access to persons confined, and shall have the right to see and consult such persons in private." (Italics added.)

In 1929 a paragraph was added to the foregoing statute indicating a legislative policy to provide greater protection to indigent defendants in capital cases and to meet the actualities of modern conditions by providing for the payment of fees to counsel appointed by the Court for such defendants. The addition reads in part (*Ill. Rev. Stat.* 1945, Chap. 38, par. 730):

> "Whenever it shall appear to the Court that a defendant or defendants *indicted in a capital case*, is or are indigent and unable to pay counsel for his or her defense, it shall be the duty of the Court to appoint one or more competent counsel for that defendant or defendants, who shall receive a reasonable sum for services, * * *". (Italics added.) However, in *People* v. *Bernovich*, 391 Ill. 141, 143; 62 N. E.

counsel. While the petitioner failed to take these two steps, it is equally clear that he did not take any affirmative action that could be construed as a competent and intelligent waiver of his Constitutional right.

Petitioner's failure to claim the aid of counsel is in sharp contrast to the affirmative statements made by the relator, McCann in *Adams* v. *United States*, 317 U. S. 269. There the record on appeal showed that McCann had refused to employ counsel and had refused the aid of counsel stating that he had studied law and was as competent, or more competent than a lawyer, to handle his own defense.

Petitioner's failure to claim the aid of counsel is a far cry from the situation presented by Glasser, an experienced attorney, and a former United States District Attorney, and who was actively represented by counsel at the time of an alleged waiver. *Glasser* v. *United States*, 315 U. S. 60, 70. Glasser was held to have been denied due process of law on the ground that he had "never affirmatively waived" an early objection that he had voiced to the appointment of his attorney as counsel for a co-defendant. In contrast, this petitioner—who stood at the Bar alone after fifteen days in jail without recourse to outside help—merely failed to claim the aid of counsel. *Glasser* v. *United States, supra.*

Any contention that there was a waiver in this case must rest upon the recitals in the judgment orders of the trial Court's "explanation" to the petitioner of his rights. Such a contention must fail, for when the recitals are laid alongside the Illinois statute, they show no more than a studious attempt to comply with a statutory requirement.

2nd. 691, the Illinois Supreme Court held (1945) in the capital case before it that:

"• • • it is well settled that in Illinois no duty is imposed upon the Court to appoint legal counsel for an accused unless he states upon oath his inability to procure legal assistance".

The Illinois Statute (*Ill. Rev. Stat.* 1945, Chap. 38, par. 732) states in part:

> "In cases where the party pleads 'guilty', such plea shall not be entered until the Court shall have *fully explained to the accused the consequences of entering such plea;* after which if the party *persists* in pleading 'guilty', such plea shall be received and recorded, and the Court shall proceed to render judgment and execution thereon, as if he had been found guilty by a jury * * *" ((Italics added).

The judgment order (R. 8) states that the Court:

> "*Fully explained to the Defendant* * * * *the consequences of such plea* and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury * * * and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant * * * *persists* in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment." (Italics added.)

The italicized portions of the above quotations show clearly that the essential phrases have been lifted from the statute in a manner that is suggestive of the discharge of the Court's duty "as a mere matter of rote" (*Patton* v. *United States*, 281 U. S. 276, 312).

A contention that the trial Court "fully explained" the petitioner's rights is the equivalent of suggesting that the trial Court acted effectively in lieu of the aid of counsel to which petitioner was entitled at every stage of the proceedings. Disposing of a similar suggestion in *Powell* v. *Alabama*, 287 U. S. 45, 61 this Court said:

> "But how can a judge, whose functions are purely judicial, effectively discharge the obligations of counsel for the accused? He can and should see to it that in

the proceedings before the Court, the accused shall be dealt with justly and fairly. He cannot investigate the facts, advise and direct the defense, or participate in those necessary conferences between counsel and accused which sometimes partake of the inviolable character of the confessional."

Moreover, such an inadequate substitute for an effective appointment of counsel, came too late. This ignorant and indigent man, whose helplessness is attested by the Court's subsequent action on the later hearing upon the question of mitigation or aggravation, had already laid his course. Without aid of counsel or knowledge of the consequences or alternatives he had tendered his plea of guilty.

In this capital case, the natural bewilderment, ignorance and indigence of this petitioner combined with the myriad legal questions and complexities presented in the trial proceedings made him incompetent to accomplish an effective waiver of his Constitutional right. *And he took no affirmative step to do so.* In short, the circumstances at Bar taken as a whole, raise the same considerations that led this Court to say in *Williams* v. *Kaiser*, 323 U. S. 471, 475:

> "These considerations underscore what was said in *Powell* v. *Alabama*, supra: 'Even the intelligent and educated layman has small and sometimes no skill in the science of law. If charged with crime, he is incapable, generally, of determining for himself whether the indictment is good or bad. He is unfamiliar with the rules of evidence. Left without the aid of counsel he may be put on trial without a proper charge, and convicted upon incompetent evidence, or evidence irrelevant to the issue or otherwise inadmissible. He lacks both the skill and knowledge adequately to prepare his defense, even though he have a perfect one. *He requires the guiding hand of counsel at every step in the proceedings against him.* Without it, though he be not guilty, he faces the danger of conviction because he does not know how to establish his innocence. If

> that be true of men of intelligence, how much more true is it of the ignorant and illiterate, or those of feeble intellect!' *Those observations are as pertinent in connection with the accused's plea as they are in the conduct of a trial.*" (Italics added.)

D. Every Reasonable Presumption is Indulged Against a Purported Waiver of Fundamental Constitutional Rights.

Presumptions indulged by this Court militate against the waiver or loss of fundamental Constitutional rights. In *Johnson* v. *Zerbst*, 304 U. S. 458, 464, this Court said:

> "It has been pointed out that Courts indulge every reasonable presumption against waiver of fundamental Constitutional rights. *Aetna* v. *Kennedy*, 301 U. S. 389, 393; *Hodges* v. *Easton*, 106 U. S. 408, 412; and that we 'do not presume acquiescence in the loss of fundamental rights. *Ohio Bell Telephone Co.* v. *Public Utilities Commission of Ohio*, 301 U. S. 292, 307' ".

Again this Court has said (*Glasser* v. *United States*, 315 U. S. 60, 70):

> "To preserve the protection of the Bill of Rights for hard-pressed defendants, we indulge every reasonable presumption against the waiver of fundamental rights."

E. The Record Does Not Show a Determination by the Trial Court That There Was a Competent and Intelligent Waiver by This Petitioner.

The very reasons that guarantee the right to counsel—the gravity of the charge, complexities and intricacies of pleading and trial and varying degrees of punishment to different crimes contained within a single charge—all these require at the same time that an accused be safeguarded by the aid of counsel from the unwitting loss of fundamental rights. If this aid is withheld it is essential that a clear

record be presented of the trial Court's determination of the validity of a claimed waiver. Ignorance, illiteracy, poverty, fear, bewilderment—all these weaknesses or any of them must be taken into account and overcome by the record before there is an effective yielding of the Federal right.

Nor is there any indication on the record of a colloquy—that the petitioner here was interrogated by the Court as to his desire to plead. (*Walker* v. *Johnston*, 312 U. S. 275, 286.) There is no reference to the making of inquiries that, if made, may have elicited answers upon which the trial Court may have based a determination of the petitioner's competence and intelligence. The record is barren of anything that could establish an affirmative waiver.

The petitioner had no schooling and no record of previous experience with Courts. Thirty years of age, he had worked the previous eleven years, as a cook, chauffeur and mechanic. After fifteen days of confinement (during which he charges that he was held *incommunicado* and moved from one county jail to another as a result of mob violence), the petitioner was brought to the Bar for arraignment. Only then was he shown a copy of an indictment charging him with murder. Under these circumstances, the same reasons that have guaranteed to such a man, "the guiding hand of counsel at every step of the proceedings against him" (*Powell* v. *Alabama*, 287 U. S. 45, 69) compel the conclusion that this petitioner required the assistance of counsel before he could make an "intelligent and competent waiver".

He could not waive what he could not understand. The intricacies and complexities of the charges and the possibilities of acquittal of the charge of murder upon a plea of guilty to manslaughter would have been most difficult for him to grasp, even if they had been explained to him. His

ignorance was the cause of his failure to claim and insist upon aid of counsel, and the same ignorance is the barrier to any claim that he made an effective waiver of that right.

The serious nature of the responsibility imposed upon a trial Court in considering a purported waiver by an accused, is emphasized by two decisions of this Court. Equal emphasis has been placed upon the increase in responsibility in proportion to the gravity of the offenses dealt with. In *Patton* v. *United States*, 281 U. S. 276, 312, this Court determined the validity of a waiver under the Sixth Amendment saying:

> "before any waiver (of trial by a constitutional jury) can become effective, the consent of government counsel and the sanction of the Court must be had, in addition to the express and intelligent consent of the defendant. *And the duty of the trial Court in that regard is not to be discharged as a mere matter of rote,* but with sound and advised discretion, with an eye to avoid unreasonable or undue departures from that mode of trial or from any of the essential elements thereof, and with a caution increasing in degree as the offenses dealt with increase in gravity." (Italics added.)

In the second case, *Johnson* v. *Zerbst*, 304 U. S. 458, 465, this Court ruled:

> "The Constitutional right of an accused to be represented by counsel invokes, of itself, the protection of a trial Court, in which the accused—whose life or liberty is at stake—is without counsel. This protecting duty imposes the serious and weighty responsibility upon the trial judge of determining whether there is an intelligent and competent waiver by the accused. While an accused may waive the right to counsel, whether there is a proper waiver should be determined by the trial Court, and *it would be fitting and appropriate for that determination to appear upon the record.*" (Italics added.)

The silent acceptance by the defendants in *Powell* v. *Alabama, supra,* of an ineffective appointment of counsel was not suggested to be a waiver of their fundamental rights. So here the silent acceptance of strange and bewildering proceedings by an ignorant and helpless defendant who had already offered his plea of guilty was likewise not a waiver of fundamental rights. It was no more than an ignorant failure to claim them.

Conclusion

It is the petitioner's position that, under all the circumstances in this capital case, he was denied his Constitutional right to the aid of counsel, and did not waive that right; that to hold otherwise

> "* * * would be to ignore the fundamental postulate, already adverted to, 'that there are certain immutable principles of justice which inhere in the very idea of free government which no member of the Union may disregard' ". *Powell* v. *Alabama,* 287 U. S. 45, 71.

APPENDIX

Illinois State Constitution Art. II, Sec. 9. Right of accused in criminal prosecutions.

"In all criminal prosecutions the accused shall have the right to appear and defend in person and by counsel, to demand the nature and cause of the accusation and to have a copy thereof, to meet the witnesses face to face, and to have process to compel the attendance of witness in his behalf and a speedy public trial by an impartial jury of the county or district in which the offense is alleged to have been committed." (*Ill. Rev. Stat.* 1945.)

The following statutory provisions appear in the Illinois Code under the heading "Homicide".

Murder: Murder is the unlawful killing of a human being in the peace of the people, with malice aforethought either expressed or implied. The unlawful killing may be perpetrated by poisoning, striking, starving, drowning, stabbing, shooting, or by any other of the various forms or means by which human nature may be overcome, and death thereby occasioned. Express malice is that deliberate intention unlawfully to take away the life of a fellow creature, which is manifested by external circumstances, capable of proof. Malice shall be implied when no considerable provocation appears, or when all the circumstances of the killing show an abandoned and malignant heart. (*Ill. Rev. Stat.* 1945, Chap. 38, par. 358.)

Murder—Punishment: Whoever is guilty of murder, shall suffer the punishment of death, or imprisonment in the penitentiary for his natural life, or for a term not less than fourteen years. If the accused is found guilty by a jury, they shall fix the punishment by their verdict; upon a plea of guilty, the punishment shall be fixed by the Court. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 360).

Manslaughter Defined: Manslaughter is the unlawful killing of a human being without malice, express or implied, and without any mixture of deliberation whatever. It must be voluntary, upon a sudden heat of passion, caused by a provocation apparently sufficient to make the passion irresistible, or involuntary in the commission of an unlawful

act, or a lawful act without due caution or circumspection. (Ill. Rev. Stat., 1945, Chap. 38, par. 361.)

Manslaughter voluntary: In cases of voluntary manslaughter, there must be a serious and highly provoking injury inflicted upon the person killing, sufficient to excite an irresistible passion in a reasonable person, or an attempt by the person killed to commit a serious personal injury on the person killing. The killing must be the result of that sudden, violent impulse of passion supposed to be irresistible; for if there should appear to have been an interval between the assault or provocation given, and the killing, sufficient for the voice of reason and humanity to be heard, the killing shall be attributed to deliberate revenge, and punished as murder. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 362.)

Manslaughter involuntary: Involuntary manslaughter shall consist in the killing of a human being without any intent to do so, in the commission of an unlawful act, or a lawful act, which probably might produce such a consequence, in an unlawful manner: Provided, always, that where such involuntary killing shall happen in the commission of an unlawful act, which in its consequences naturally tends to destroy the life of a human being, or is committed in the prosecution of a felonious intent, the offense shall be deemed and adjudged to be murder. (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 363.)

Manslaughter—Punishment: Whoever is guilty of manslaughter shall be imprisoned in the penitentiary for from one to fourteen years. (As amended by act approved July 6, 1927. L. 1927, p. 398.) (*Ill. Rev. Stat.*, 1945, Chap. 38, par. 364.)

Self-Defense: If a person kill another in self-defense, it must appear that the danger was so urgent and pressing that in order to save his own life, or to prevent his receiving great bodily harm, the killing of the other was absolutely necessary; and it must appear also, that the person killed was the assailant, or that the slayer had really, and in good faith, endeavored to decline any further struggle before the mortal blow was given. (*Ill. Rev. Stat.* 1945, Chap. 38, par. 367.)

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR PETITIONER

STEPHEN A. MITCHELL,
Counsel for Petitioner.

WILLIAM I. CONWAY,
SHERLOCK J. HARTNETT,
Of Counsel.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1946

No. 36

HARICE LEROY CARTER,

Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,

Respondent

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS

REPLY BRIEF FOR PETITIONER

Correction of Respondent's Restatement of the Case

The respondent's Restatement of the Case requires correction on two points:

1. Respondent states that the petitioner has failed to make clear the distinction between the common law record and the other documents contained within the transcript of record on this appeal. In fact, these distinctions have been made abundantly clear by a careful documentation and specific references to the source of all of the facts stated in

the petitioner's brief. The facts outlined at the outset of petitioner's "Statement of the Case" are stated to have been taken from the "Petition for Writ of Error, R. 41-42." Again on pages 9 and 10 of Petitioner's Brief clear and appropriate references have been made to the Information that was certified to the penitentiary officials, and to the fact that "• • • The transcript was not certified by the trial judge and the State, and no Bill of Exceptions was filed."

2. On page 5 of Respondent's Brief reference is made to the entry of the judgment order of the trial Court on June 29, 1928. This is recited in such a way as to imply that petitioner was represented in open Court by an attorney on that day. Actually, the record shows that L. W. Tuesburg, having been appointed to appear only upon a hearing on the question of mitigation or aggravation, was present only on June 18th. The record does not show that Mr. Tuesburg was present on June 29th (Tr. 11). The petitioner made explicit reference to this significant circumstance at page 7 of Petitioner's Brief.

ARGUMENT

I

Reply to Respondent's Contention That "The Common Law Record Does Not Sustain the Contention That Petitioner Was Denied the Right of Counsel or Any Other Federal Constitutional Right".

Respondent first contends that the trial Court had no alternative, upon the petitioner's plea of guilty, but to proceed upon that plea. This is a fundamental error for the Court had two obvious legal alternatives:

1. Refuse to enter the plea, adjourn the hearing, and appoint counsel to aid the petitioner;

2. Interrogate the petitioner and make a determination, *upon the record*, of the Court's finding as to whether the petitioner was sufficiently competent and intelligent to make a valid waiver of his right to counsel, and further whether in fact the petitioner, understandingly, wished to make such a waiver.

Respondent has made five separate assertions, as alleged matters of fact, that the accused rejected a proffer or his right to counsel (Respondent's Brief, pages 10, 12, 13). There is nothing in the record in this case to support these assertions. The petitioner did not reject a proffer of counsel, nor did he decline representation. On the contrary, the petitioner merely failed to take the affirmative steps required by the Illinois Statute, i.e. make a request for appointment of counsel, and make affidavit that he is unable to procure counsel. (Ill. Rev. Stat. 1927 chap. 38, par. 754; Petitioner's Brief, p. 26, note 3.) The petitioner's only action was to plead guilty. A plea of guilty and a failure to claim and demand aid of counsel does not amount to an intelligent and competent waiver of counsel (Brief for Petitioner Point II, pages 23-30).

Lacking any showing upon the record in this case that the petitioner took any affirmative step to waive his right to counsel and lacking anything in the record approaching a determination by the trial Court of a competent and intelligent waiver by petitioner, respondent has sought to expand a simple plea of guilty into a rejection of the aid of counsel and to make it a substitute for an understanding waiver that never was made.

While some affirmative step other than a plea of guilty is required in order to constitute an effective waiver, it is not necessary that an accused in a capital case who is entitled to the aid of counsel, make a request for such

counsel. *Powell* v. *Alabama*, 287 U. S. 45, 71; *Rice* v. *Olson* 324 U. S. 786, 789.

The substance of Respondent's argument rests on only two cases. The first of these, *Adams* v. *United States*, 317 U. S. 269, was not a capital case while this petitioner was indicted and convicted of murder. The petitioner has distinguished the *Adams* case from the case at Bar and quoted appropriate excerpts from the opinion at pages 21, 22, 24 and 27 of Brief for Petitioner. The defendant, McCann, in the *Adams* case, was a man of mature judgment and experience who insisted that he was competent to conduct his own defense. Moreover, McCann pleaded not guilty and defended himself in the course of an extended trial. His decision to waive counsel and a jury trial was made well in advance of the actual trial. Here the petitioner pleaded guilty to murder, without the aid of counsel, on the day that the indictment was handed to him.

Respondent's second case is *Canizio* v. *New York*, 326 U. S. 666. This decision was respondent's sole reliance for opposition to this petitioner's Petition for Certiorari. But it now appears that the respondent concedes that the *Canizio* case does not control the case at Bar (Respondent's Brief, p. 12). As petitioner has stated, and the respondent now admits, the general appearance of counsel for Canizio is in direct contrast to the limited scope of the appointment of Mr. Tuesburg for the petitioner upon the sole question of mitigation or aggravation. In conceding that the appointment of Mr. Tuesburg was so limited as not to satisfy the requirements of Due Process, respondent states (Respondent's Brief, page 12):

> "We concede that, had the accused not explicitly waived his right to counsel before pleading guilty, such an appointment of counsel for purposes so limited would not have satisfied the requirements of Due Process."

Again respondent concedes (Respondent's Brief, p. 13) that the question facing the petitioner in determining his plea was "a delicate one." This understatement does not obscure or relieve the complexities and intricacies of the legal problems that the petitioner faced, unaided by counsel, upon arraignment. The ingredients of the crime of murder, as distinguished from the lesser offenses, are not simple but ones over which skilled judges[1] and practitioners have disagreements. *Tompkins* v. *Missouri*, 323 U. S. 485, 488, 489.

II

Respondent's Brief Does Not Attempt to Meet Petitioner's Argument and the Controlling Principles and Cases Cited.

These omissions from respondent's brief are significant:

1. Respondent does not dispute that a citizen who is charged with a capital crime is entitled to the aid of counsel, *at every step* of the proceedings against him.

2. No challenge is made of the proposition that the aid of counsel is just as essential to due process of law in connection with the plea of an accused as it is in the conduct of a trial.

3. Respondent does not deny that the Court's appointment of Mr. Tuesburg was an admission *on the record* that the petitioner was helpless.

4. No attempt has been made to excuse the failure of the trial Court to determine *upon the record* whether the

---

[1] The defendant in *People* v. *Motuzas*, 352 Ill. 340, 185 N. E. 614, waived jury trial of an indictment for murder and was found guilty by a trial judge who heard all of the evidence. Upon review the Illinois Supreme Court reversed the judgment *without remandment*, holding that the defendant was innocent of murder and not guilty of any crime.

accused made an affirmative and understanding waiver of his right to the aid of counsel.

5. Respondent avoids the petitioner's contention that his plea of guilty did not constitute a waiver.

6. Despite respondent's contrary position urged upon and accepted by the Illinois Supreme Court no claim is now made that the petitioner in this capital case was required to request the aid of counsel.

7. Respondent does not deny that every reasonable presumption is indulged by this Court against a purported waiver of fundamental Constitutional rights.

Conclusion

The petitioner re-asserts that he was imprisoned without due process of law and in disregard of his Constitutional right under the Fourteenth Amendment; that he was entitled to the aid of counsel at every step of the proceedings against him; that his ignorance was the cause of his plea of guilty; and that this same ignorance is the barrier to any claim that he made an effective waiver of his Constitutional right.

Respectfully submitted,

STEPHEN A. MITCHELL,
Counsel for Petitioner.

WILLIAM I. CONWAY,
SHERLOCK J. HARTNETT,
Of Counsel.

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. [redacted] 36

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. HARICE LEROY CARTER,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden Illinois State Penitentiary, Joliet, Illinois,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

CHAMPION-SHEALY COMPANY, CHICAGO 368

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IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1945

No. 764

THE PEOPLE OF THE STATE OF ILLINOIS, ex rel. HARICE LEROY CARTER,

Petitioner,

vs.

JOSEPH E. RAGEN, Warden Illinois State Penitentiary, Joliet, Illinois,

Respondent.

BRIEF FOR RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

STATEMENT OF THE CASE.

The petitioner sued out a writ of error from the Supreme Court of Illinois to review his conviction of the crime of murder, which conviction followed his plea of guilty to that offense in the circuit court of Livingston County, Illinois.

He brought before the Supreme Court of Illinois only the common law record, which record, under the Illinois practice in criminal cases does not include a bill of exceptions or report of proceedings at the trial.

He complains that it does not appear that counsel was appointed to defend him before he entered his plea of guilty. He does make it appear, however, by a statement in his brief, that the court appointed "L. W. Tuesburg, a duly licensed and practicing attorney, and a member of the bar of the Court, to represent the defendant, Harice Leroy Carter, etc., on the question of mitigation or aggravation of said murder to which, as aforesaid, the defendant had plead guilty."

The common law record does not disclose that either the defendant or the counsel who was appointed to represent him before he was sentenced made any effort to withdraw the plea of guilty and submit the petitioner's fate to the hands of the jury, or as is permissible in the State of Illinois, if the state's attorney consents, to a trial by the court without a jury on a plea of not guilty.

The petitioner also sought, by statements *dehors* the record on review, to canvas the merits of his case; but the Supreme Court of Illinois refused, in accordance with the invariable practice of that and all other courts of review, to substitute the petitioner's assertions in his brief for a transcript of record embodied in a bill of exceptions or report of proceedings at the trial.

Questions Presented.

The only question presented is the question whether it fairly appears that petitioner was unconstitutionally denied the right of counsel.

ARGUMENT.

I.

The petitioner was not unconstitutionally denied the right counsel.

This case is indistinguishable, at least in any aspect favorable to the instant petitioner, from the case of *Canizio* v. *People of the State of New York*, 66 S. Ct. 452, 326 U. S. . . ., (not yet officially reported). In that case, as in the instant case, the petitioner entered a plea of guilty without counsel. But in that case, precisely as in this case, before sentence was imposed, counsel appeared for him. In that case, as in the instant case, neither the petitioner nor his counsel made any effort to withdraw the plea of guilty.

In that case, this court held that it would be inferred that petitioner's election to abide by his plea of guilty was an informed election, advisedly made, and represented a reasonable judgment as to what his best interests required.

In Illinois, upon plea of guilty, the judge must hear evidence in aggravation and mitigation; but upon a plea of not guilty, the penalty, which may be any years not less than 14, or which may be death by electrocution, is, in the event of conviction of murder, fixed by the jury. (Ill. Rev. Stats., 1945, Ch. 38, par. 801.) In many cases, it is the part of wisdom to plead guilty and submit to presumably more dispassionate sentence by the court.

Such features as differentiate *Canizio* v. *People*, cited above, from the instant case militate not in favor of but adversely to the present petitioner. In the *Canizio* case, the petitioner charged, by petition for New York's statutory *coram nobis*, matter *dehors* the record. He was only 19

years old and laid a foundation for the contention, to which four members of this court acceded in the dissenting opinion, that he was afraid to withdraw his plea of guilty after it had been entered, for fear that the plea would be entered as evidence again him in the nature of a confession. No such contention is intimated in the instant case.

If there were any facts *dehors* the record in the instant case, such as that petitioner importuned his counsel to withdraw his plea of guilty or that he was not fairly and adequately represented, petitioner could have made those facts apparent by a motion for a writ of error *coram nobis*. See *People* v. *Green*, 355 Ill. 468.

It may be suggested that since the court's order, if read literally and technically, appointed counsel only on the issue of aggravation and mitigation, it was not the duty of such counsel to consider or advise the petitioner as to his right to withdraw his plea of guilty and make the plea of self-defense that, by assertions in his brief, he intimates that he had. But certainly it cannot be presumed that a member of the bar, appointed to represent a man in a capital case, would not only undertake his assignment but would represent his client at a hearing which embodied the substance of a trial without advising him as to his right to withdraw his plea of guilty and substitute therefore his plea of not guilty.

The test is whether the action of the trial court shocks the universal sense of justice. Surely receiving a plea of guilty and then appointing counsel, instead of appointing counsel prior to arraignment, when the court may and ordinarily would, upon request, allow a withdrawal of the plea does not meet this test.

Conclusion.

For the reasons suggested in this brief, it is submitted that the writ of *certiorari* should be denied.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General.
Of Counsel.

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IN THE

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OCTOBER TERM, A. D. 1946.

No. 36

HARICE LEROY CARTER,
Petitioner,

vs.

THE PEOPLE OF THE STATE OF ILLINOIS,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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IN THE

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Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF ILLINOIS.

BRIEF FOR RESPONDENT.

RESPONDENT'S RESTATEMENT OF THE CASE.

Counsel for the petitioner, commendably anxious to say nothing that might prejudice the man whom this court has appointed him to defend, has failed to make it clear that the physical documents lodged by petitioner with the clerk of the Illinois Supreme Court contain much written interpolation by petitioner that did not and could not possibly constitute matter of judicial record of which that court could take cognizance in reviewing petitioner's conviction.

Petitioner was without legal skill and failed to appreciate that the principles of appellate review depend upon the concept of an authenticated record as distinguished from mere written assertions of a litigant. Accordingly he deposited with the clerk of the Supreme Court of Illinois a duly and properly certified common law record, the contents of which will be hereafter summarized to the extent material to present the issues in this case. But he attached to this properly prepared and properly certified common law record the following papers, none of which was authenticated or certified in accordance with the rules of Illinois appellate procedure and all of which constituted wholly extra-judicial utterances of his own:

(1) A purported copy of a paper entitled "Information to Board of Managers, Illinois State Penitentiary," the original supposedly having been signed by the state's attorney and judge presiding at his trial.

(2) A document entitled "Abstract of Testimony at Hearing on Question of Mitigation or Aggravation, June 18, 1928." This document, which comprises pages 14 to 40 of the transcript, reads very much like a partial narrative condensation (it does not even purport to be a complete recension) of testimony taken in open court. It purports to summarize some (but does not even purport to summarize all) of the testimony that was taken upon the hearing by reducing it to narrative form. **But this purported abstract of testimony was never approved or certified by the trial judge as a bill of exceptions or report of proceedings at the trial, nor was it even filed with the clerk of the trial court, nor does the clerk of the trial court certify that this narrative formed any part of the records of his court. Its authorship is anonymous.**

(3) A petition for writ of error (such petitions are not in use in Illinois, writs of error being procurable by the filing of a *praecipe* therefor), in which petitioner undertakes further narrative statement, not merely of what he

says occurred or was proved at the trial, but of alleged misconduct in the matter of petitioner's arrest, alleged attempts to extort a confession, and other alleged abuses of petitioner's civil rights.

None of the three items above mentioned constituted any part of the record of the judicial proceedings that had culminated in petitioner's conviction and sentence. The Supreme Court of Illinois observes (Tr. p. 44) that there was no bill of exceptions. It states that the only record accessible to scrutiny or review was the common law record and concluded its opinion by saying:

> "Others errors assigned relate to his complaint that he was deprived of due process of law by reason of the method of his arrest and that he did not have a fair trial based upon competent evidence. There is no basis in the common-law record on which the court can review such questions. Therefore they cannot be considered. *People* v. *Lantz*, 387 Ill. 72; *People* v. *Bertrand*, 385 Ill. 289; *People* v. *Keller*, 353 Ill. 411."

But although these documents of petitioner's did not comprise a part of the record of the trial court, nevertheless they were filed with the clerk of the Supreme Court of Illinois at least in the physical sense that they were lodged or deposited with him as papers attached to the properly certified common law record; and so they do form a part of the records of the Supreme Court of Illinois. Therefore they have been certified to this court as a record of what the petitioner filed in the Supreme Court of Illinois, *not* as a record of what occurred in the trial Court proceeding of which he complains.

Yet counsel for petitioner refers to the matters, actual or alleged, recited in these extrajudicial documents precisely as though they were a part of the record in this case. We shall not refer to any of the matters which these papers purport to recite except to the extent necessary to point out in the Argument which of petitioner's

statements are supported by the duly certified common law record and which of them are predicated wholly upon these writings that form no part of that record.

The Substance of the Common Law Record of the Circuit Court of Livingston County.

On June 12, 1928, the grand jury of Livingston County returned an indictment charging petitioner with the murder by shooting of one James D. Churchill (Tr. pp. 2-8). No question is raised as to the sufficiency of the indictment.

On June 15, 1928, the following "Judgment on Plea of Guilty" was entered. The court's particular attention is called to the emphasized typography below:

> "This day come the said People by Neil Kerr State's Attorney in and for Livingston County and State of Illinois and also comes the Defendant Harice Leroy Carter commonly known as Roy Carter in his own proper person into Open Court.
>
> "And the said Defendant Harice Leroy Carter commonly known as Roy Carter is here and now by the clerk of this Court furnished with a true copy of the indictment herein with the names of the People's witnesses thereon together with a list of the petit jurors for the present term of this Court.
>
> "And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. *Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises* **including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors** *sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter com-*

monly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment.

"It is therefore considered, ordered and adjudged by the Court that the defendant Harice Leroy Carter commonly known as Roy Carter stands convicted of the crime of murder charged in the indictment under his plea of guilty entered of record in this cause.

"And now this cause coming on further hearing *the Court appoints L. W. Tuesburg a duly licensed and practicing attorney and a member of the bar of this Court to represent the said defendant Harice Leroy Carter commonly known as Roy Carter on question of migitation or aggravation of said crime of murder to which said defendant has pleaded guilty,* and which said question of mi*g*itation or aggravation of said crime of murder is hereby set down for hearing before the Court on *MO*June 18th A. D. 1928 at nine thirty o'clock in the morning." (Tr. pp. 8-9.)

The recital emphasized above is not disputed or contradicted by anything in the common law record.

The minute entry of June 18, 1928, recites the fact that a hearing on the question of mitigation or aggravation was held, that the court "heard all of the evidence adduced by the People as well as that adduced by the said defendant" and "heard the arguments of counsel for both parties" and recited that the matter was taken under advisement (Tr. pp. 9-10).

On June 29, 1928, the court entered its judgment and pronounced sentence of imprisonment for a period of ninety-nine years (Tr. pp. 10-12). The judgment order contains, *inter alia,* a recital of the fact of defendant's being "present in open court in his own proper person and by his attorney, L. W. Tuesburg."

The foregoing is a statement of the full substance of the common law record in this cause, which was the only record that was before the Supreme Court of Illinois.

SUMMARY OF ARGUMENT AND AUTHORITIES IN SUPPORT THEREOF.

I.

The Supreme Court of Illinois might, compatibly with federal due process, limit the scope of appellate review to matters appearing in the common law record, and might disregard self-serving statements of the accused as to alleged matters dehors the common law record.

Claassen v. *United States*, 142 U. S. 140, 147.
Mathews v. *United States*, 123 U. S. 182.
People v. *Street*, 353 Ill. 60.
People v. *Meyering*, 352 Ill. 314.
People v. *Bush*, 300 Ill. 532.
People v. *Stubblefield*, 391 Ill. 609.
People v. *Stack*, 391 Ill. 15.
People v. *Braner*, 389 Ill. 190.

II.

The common law record does not sustain the contention that petitioner was denied the right of counsel or any other federal constitutional right.

Adams v. *United States*, 317 U. S. 269.
Canizio v. *New York*, 326 U. S. 666.

ARGUMENT.

I.

The Supreme Court of Illinois might, compatibly with federal due process, limit the scope of appellate review to matters appearing in the common law record, and might disregard self-serving statements of the accused as to alleged matters dehors the common law record.

We deem it unnecessary to argue at length that a court of appellate review does not deny federal constitutional rights by confining the scope of its scrutiny to a properly authenticated record and that it need not consider such self-serving documents as litigants may choose to attach physically to the record as certified by the clerk of the lower court. This court's practice is to confine its review on appeals in criminal cases (the statutory substitute for the common law writ of error) to the record of the lower courts.

"Upon writ of error no error in law can be reviewed by this court which does not appear upon the record, or by bill of exceptions made part of the record" (*Claassen* v. *United States*, 142 U. S. 140, at page 147). Objection that the defendant was denied his constitutional right to be present at the time of sentence could not be entertained on writ of error where his claim of absence was based on alleged matter *dehors* the record. *Mathews* v. *United States*, 123 U. S. 182.

This principle is, we believe, universal in all American courts of appellate jurisdiction. The Illinois Supreme Court has always held that it could not review on writ of error any matter that was not either in the common law record or in a duly authenticated bill of exceptions.

Cases sustaining this rule are cited in the margin with quotation of applicable excerpts from the opinions of the court.[1]

These observations are important, not because they are overtly controverted by petitioner's counsel, or because they are doubtful, but because once it is perceived that the entire burden of petitioner's argument in this court is predicated both directly and indirectly upon his assertion of matters wholly ulterior to the record, it must be realized that his argument refers to no basis of which either the Supreme Court of Illinois or this court might properly take cognizance.

II.

The common law record does not sustain the contention that petitioner was denied the right of counsel or any other federal constitutional right.

It appears by the common law record that the petitioner was indicted for murder, that he was arraigned, that he

---

[1] *People* v. *Street*, 353 Ill. 60, the court said at pages 62-63:

"* * * The rule is well settled in this State, as shown by numerous citations of authority in behalf of plaintiff in error, that the duty of a trial court to assign competent counsel to defend an accused person who is unable to employ counsel of his own is not intended as a mere empty formality, nor is counsel thus appointed required to act without being allowed a reasonable time to become familiar with the facts in the case and to prepare the defense. *While adhering to these rules of law, and desiring, whenever possible, to apply them in furtherance of substantial justice to all persons charged with crime, nevertheless it is of equal, if not greater, importance that this court should always confine its reviews to matters affirmatively appearing in the record before us.* Every fact and matter that the prisoner may deem essential to his rights and to a fair and regular trial which is not essentially a part of the record proper, must, if review be sought in relation thereto, be made a part of the record by a bill of exceptions. *People* v. *Munday*, 293 Ill. 191."

Matter appended to the transcript but not incorporated therein as a part of the common law record or by way of bill of exceptions, duly signed by the trial judge and filed and certified by the clerk, cannot be considered. *People* v. *Meyering*, 352 Ill. 314; *People* v. *Bush*, 300 Ill. 532; see also the cases to this effect cited by the Illinois Supreme Court in its opinion in the instant case, viz., *People* v. *Stubblefield*, 391 Ill. 609; *People* v. *Stack*, 391 Ill. 15; and *People* v. *Braner*, 389 Ill. 190.

indicated a desire to plead guilty, and that he had "fully explained" to him "the consequence of such plea and of all his rights in the premises, including the right to have a lawyer appointed by the court to defend him," his "right to a trial before a jury of twelve jurors" and "the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty" which he had a right to enter; and that thereupon the defendant "persisted in his desire to plead guilty."

The court therefore had no alternative under Illinois criminal jurisprudence except to hear, without a jury, evidence and argument upon the issue of "mitigation or aggravation" of guilt, to the end that the court might be informed of the facts and circumstances that might properly bear upon the measure of the punishment to be inflicted upon the defendant. (Ill. Stats. Annotated, Ch. 38, par. 801.) This the court proceeded to do; but not until after counsel had been appointed for the prisoner.

It must be remembered that nothing in the common law record supports any of the petitioner's own statements or the statements of his counsel to the effect that he was ignorant of his rights, that he was a colored man who had killed a white man, that he entered a plea of guilty under fear of violence, or that the killing took place under circumstances even remotely resembling those narrated in the self-serving statements that petitioner attached to his common law record.

For example, nothing that was properly before either the Supreme Court of Illinois or that is before this court indicates whether petitioner killed the deceased as a result of an altercation over the use of a public highway (as petitioner's counsel says) or whether petitioner killed the deceased in a bank robbery, in a fight over the affections of a lady, or in a saloon brawl. If, acceding to the

importunities of petitioner's counsel in the instant case, this court should take the slightest cognizance of petitioner's and his counsel's excursions from the record into the realm of matter *in pais,* this court would in effect require every supreme court of every state, and presumably every circuit court of appeals, to decide cases upon wholly extrajudicial assertions appended by a convicted person to an otherwise properly certified record.

Stripped, then, of all matters *dehors* the record proper, this case presents only the naked facts that an accused was arraigned upon an indictment for murder, that he chose to plead guilty, that he was advised of his right of counsel, that he rejected the proffer of counsel and persisted in his plea, that he had the benefit of counsel upon the hearing with respect to aggravation or mitigation and that he was sentenced on his plea.

There are literally thousands of such records in the archives of both state and federal courts throughout the United States. If this case is to be reversed upon such a record, then the majority of those persons who have pleaded guilty and received a sentence are entitled to a reversal of their sentences; *and this even though the record may affirmatively show that the accused rejected the right of counsel and stated that he wanted to persist in his plea of guilty.*

Adams v. *United States,* 317 U. S. 269, is, we submit, so incisively pertinent as to be controlling in principle even though certain circumstances might differentiate its factual complex from that of the instant case.

In that case, as in the instant case, the defendant was tendered the assistance of counsel but, though he had pleaded not guilty to a charge of using the mails to defraud, he declined representation and insisted upon defending himself. He claimed and obtained the right to decide for himself whether he would face a jury or a bench trial, chose

and received the latter, and suffered conviction. Even though the charge was highly technical and it affirmatively appeared that the accused was not a lawyer, this court upheld his conviction.

Assimilating the case to one in which (as in the instant case) an accused pleads guilty without counsel, this court said (at pages 276-277):

> "* * * Legislation apart, no social policy calls for the adoption by the courts of an inexorable rule that guilt must be determined only by trial and not by admission. A plea of guilt expresses the defendant's belief that his acts were proscribed by law and that he cannot successfully be defended. * * * **And not even now is it suggested that a layman cannot plead guilty unless he has the opinion of a lawyer on the questions of law that might rise if he did not admit his guilt. Plainly, the engrafting of such a requirement upon the Constitution would be a gratuitous dislocation of the processes of justice.** * * *" (Emphasis supplied.)

It is quite true that this court indicated in the *Adams* case that "The question in each case is whether the accused was competent to exercise an intelligent, informed judgment" and that the question whether counsel has been unconstitutionally denied or properly dispensed with is not to be solved by "delusively simple rules of trial procedure which judges must mechanically follow."

But the utmost that this observation requires in the case at bar is that the trial court must exercise judicial circumspection in the matter of permitting accused persons to dispense with counsel. *Nothing in the instant record proper suggests or intimates that this was not done.* It must be remembered that *all* of petitioner's and his counsel's statements as to the facts and circumstances allegedly involved in, affecting or attendant upon the proceedings in the trial court are based upon statements that form no part of but completely transcend the record in this case.

In the federal courts, a full memorial of proceedings in a criminal case, when such a memorial is to be presented for appellate review, consists of two parts, a common law record and such recitals of proceedings *viva voce* (or matters otherwise not a part of the common law record) as are preserved in a bill of exceptions. (See cases cited, Point I, *ante*.) It must be presumed that if a bill of exceptions reciting *verbatim* the proceedings prior to, at and after arraignment had been tendered and signed in this case, it would have comported with the recital in the common law record that the accused was fully advised of his right to counsel. A contrary surmise (a) would contradict the presumption that trial courts respect the constitution and (b) would contradict the common law record.

It should be observed, moreover, the court did appoint counsel for the petitioner. It is quite true that the record formally limited the scope of counsel's duties to representing the prisoner on the issues pertinent to aggravation and mitigation; and we concede that, had the accused not explicitly waived his right to counsel before pleading guilty, such an appointment of counsel for purposes so limited would not have satisfied the requirements of due process.

The case bears analogy to *Canizio* v. *New York*, 326 U. S. 666. In that case, as in the case at bar, the accused entered a plea of guilty without the benefit of counsel. Indeed, in the *Canizio* case it did not appear that he was apprised of his right to counsel, whereas petitioner in this case had that right "fully explained" to him. In the *Canizio* case, as in the instant case, counsel appeared for the accused in apt time to apply for withdrawal of the plea of guilty; but in both the *Canizio* case and this case, counsel did not deem it to the best interests of the accused to attempt to withdraw the plea.

It is true that counsel in the *Canizio* case appeared generally for his client whereas in the instant case, counsel was appointed (technically, at least) only on the issue of aggravation and mitigation. This would be an important distinction between the two cases if petitioner in the instant case had not voluntarily waived counsel on arraignment after the court had advised him of his rights.

But even though petitioner waived his right to counsel, it cannot be presumed that both the trial court and counsel (even though counsel was technically appointed only for limited purposes) would hear the evidence pertinent to the case and would allow petitioner to stand convicted upon his plea of guilty without advising him of his right to withdraw the same if it were in his best interests to do so. The question whether the accused should take his chances with the jury or throw himself upon the mercy of the court on a plea of guilty was, as counsel for him in this court not only concedes but insists, a delicate one. On the naked common law record, it can not be presumed that both his counsel and the court were careless of his rights.

This case cannot be reversed on the common law record alone unless this court is prepared to hold that in every serious criminal case, the trial court must appoint counsel for the accused before receiving a plea of guilty; and this even though the accused declines counsel after having had his rights "fully explained" to him by the court. Nothing in the entire history of Anglo-American jurisprudence even suggests, much less requires, such a result. Neither the Fifth, the Sixth nor the Fourteenth Amendments has ever been construed by any court (insofar as patient research has disclosed) as requiring categorically, absolutely and mechanically that no man may plead guilty to murder, no matter what the circumstances, without counsel, even

though he says that he does not want counsel. Should this court commit itself to any such declaration in the instant case, many thousands of prisoners now incarcerated upon pleas of guilty entered after the right to counsel was declined would be set at large.

Such a result would, of course, not deter this court from such a declaration if it were convinced that the organic law of the United States could not otherwise be properly expounded. But the practical construction, acquiesced in by every *nisi prius* court and every court of review in the land from days long antedating the Constitution until the present moment, demonstrates conclusively and absolutely that such a holding would not serve the understanding either of the framers of the Constitution or of any of the many thousands of jurists and constitutional scholars who have perused and applied its text in criminal cases. And where the text of the constitution has long been construed by unanimous consensus, an exegetical reading overriding that consensus is certainly not necessary and, we submit for important reasons briefly noted in the margin, is not even appropriate.[2]

This is, of course, not to say that if the record shows that in a given case, the accused should have been tendered

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[2] A question theoretically implicit in every problem of constitutional construction and practically exigent in the instant case may be stated by asking, When the meaning of the constitution is sought, whose understanding is to determine the "meaning?" Is it the meaning of that instrument to its authors, or to those who adopted the constitution and the several amendments that have been added thereto by voting in favor thereof, or to academicians in the field of political philosophy, or to lawyers generally, or to the hypothetical "reasonable man"? And if the latter, then is it the probable meaning to the "reasonable man" of the time of the adoption of the constitution (or the amendment in question, as the case may be), or to the "reasonable man" of today? Or is it perchance a composite question of what ideas a "reasonable man of today" would ascribe to a putative "reasonable man" reading the constitutional language at the time of its adoption?

While it is this court that decides questions of constitutional interpretation, it does so upon the assumption that it is reading a document that has been read by others whose understanding of its language is im-

counsel in order to prevent a miscarriage of justice notwithstanding his refusal thereof, due process would not be denied. But unconstitutional denial of liberty should not be imputed to trial courts in contradiction of the recitals of the record and as against the presumption that constitutional rights have not been infringed.

CONCLUSION.

For the reasons urged in this brief, it is respectfully submitted that the judgment of the Supreme Court of Illinois should be affirmed.

Respectfully submitted,

GEORGE F. BARRETT,
Attorney General of the State of Illinois,
Attorney for Respondent.

WILLIAM C. WINES,
Assistant Attorney General,
Of Counsel.

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portant. In short, this court must state its own understanding of a presumable "general" understanding of the constitution as a document, not of this court alone, but of the people.

In highly technical cases involving unusual and abstruse rights such as those arising in tax matters, the abstractions implied in the notion of a patent on a complex invention, or intricate property settlements, the court can consult only those general canons of natural justice and common understanding that may be presumed to illuminate the particular technical problem at hand. But in the instant case, the court is confronted with the simplest possible situation; a plea of guilty entered in a form and mode that has been known to the common law for centuries. Unanimous approbation of the acceptance of such pleas, where counsel is offered and declined is, we submit, not merely relevant but *conclusive* on what the constitution means in this connection to those intrusted with supporting and enforcing it.

dissent p. 5

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner, v. The People of the State of Illinois.	On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Frankfurter delivered the opinion of the Court.

In 1928 petitioner pleaded guilty to an indictment for murder and was sentenced to imprisonment for 99 years. In 1945 he brought a petition for his release on writ of error in the Supreme Court of Illinois claiming that the conviction on which his confinement was based was vitiated by the denial of his right under the Fourteenth Amendment to the assistance of counsel. The Supreme Court of Illinois affirmed the original judgment of conviction. 391 Ill. 594. In view of the importance of the claim, if valid, we brought the case here. 328 U. S. —.

In a series of cases of which *Moore* v. *Dempsey*, 261 U. S. 86, was the first, and *Ashcraft* v. *Tennessee*, 327 U. S. 274, the latest, we have sustained an appeal to the Due Process Clause of the Fourteenth Amendment for a fair ascertainment of guilt or innocence. Inherent in the notion of fairness is ample opportunity to meet an accusation. Under pertinent circumstances, the opportunity is ample only when an accused has the assistance of counsel for his defense. And the need for such assistance may exist at every stage of the prosecution, from arraignment to sentencing. This does not, however, mean that the accused may not make his own defense; nor does it prevent him from acknowledging guilt when fully advised of all its implications and capable of understanding them. Neither the historic conception of Due Process nor the vitality it derives from progressive standards of justice denies a per-

son the right to defend himself or to confess guilt. Under appropriate circumstances the Constitution requires that counsel be tendered; it does not require that under all circumstances counsel be forced upon a defendant. *U. S. ex rel. McCann* v. *Adams*, 320 U. S. 220.

The solicitude for securing justice thus embodied in the Due Process Clause is not satisfied by formal compliance or merely procedural regularity. It is not conclusive that the proceedings resulting in incarceration are unassailable on the face of the record. A State must give one whom it deprives of his freedom the opportunity to open an inquiry into the intrinsic fairness of a criminal process even though it appears proper on the surface. *Mooney* v. *Holohan*, 294 U. S. 103. Questions of fundamental justice protected by the Due Process Clause may be raised, to use lawyers' language, dehors the record.

But the Due Process Clause has never been perverted so as to force upon the forty-eight States a uniform code of criminal procedure. Except for the limited scope of the federal criminal code, the prosecution of crime is a matter for the individual States. The Constitution commands the States to assure fair judgment. Procedural details for securing fairness it leaves to the States. It is for them, therefore, to choose the methods and practices by which crime is brought to book, so long as they observe those ultimate dignities of man which the United States Constitution assures. *Brown* v. *New Jersey*, 175 U. S. 172, 175; *Missouri* v. *Lewis*, 101 U. S. 22, 31. Wide discretion must be left to the States for the manner of adjudicating a claim that a conviction is unconstitutional. States are free to devise their own systems of review in criminal cases. A State may decide whether to have direct appeals in such cases, and if so under what circumstances. *McKane* v. *Durston*, 153 U. S. 684, 687. In respecting the duty laid upon them by *Mooney* v. *Holohan*, States have a wide choice of remedies. A State may provide that the protec-

tion of rights granted by the Federal Constitution be sought through the writ of *habeas corpus* or *coram nobis*. It may use each of these ancient writs in its common law scope, or it may put them to new uses; or, it may afford remedy by a simple motion brought either in the court of original conviction or at the place of detention. See, *e. g.*, *New York ex rel. Whitman* v. *Wilson*, 318 U. S. 688; *Matter of Lyons* v. *Goldstein*, 290 N. Y. 19, 25; *Matter of Morhous* v. *N. Y. Supreme Court*, 293 N. Y. 131; *People* v. *Gersewitz*, 294 N. Y. 163, 168; *Matter of Hogan* v. *Court of General Sessions*, 296 N. Y. 1, 9. So long as the rights under the United States Constitution may be pursued, it is for a State and not for this Court to define the mode by which they may be vindicated.

An accused may have been denied the assistance of counsel under circumstances which constitute an infringement of the United States Constitution. If the State affords no mode for redressing that wrong, he may come to the federal courts for relief. But where a remedy is provided by the State, a defendant must first exhaust it in the manner in which the State prescribes. *Ex parte Hawk*, 321 U. S. 114; *House* v. *Mayo*, 324 U. S. 42. For the relation of the United States and the courts of the United States to the States and the courts of the States is a very delicate matter. See *Ex parte Royall*, 117 U. S. 241, 251. When a defendant, as here, invokes a remedy provided by the State of Illinois the decision of the local court must be judged on the basis of the scope of the remedy provided and what the court properly had before it in such a proceeding. *Woods* v. *Nierstheimer*, 328 U. S. —. The only thing before the Illinois Supreme Court was what is known under Illinois practice as the common law record. That record, as certified in this case, included only the indictment, the judgment on plea of guilty, the minute entry bearing on sentence, and the sentence. And so the very narrow question now before us is whether this com-

mon law record establishes that the defendant's sentence is void because in the proceedings that led to it he was denied the assistance of counsel.

This case is quite different from a case like *Rice* v. *Olson*, 324 U. S. 786. In that case the record properly before this Court contained specific allegations bearing on the disabilities of the defendant to stand prosecution without the aid of counsel. There was not, as we have here, an unchallenged finding by the trial court that the accused was duly apprised of his rights and, in awareness of them, chose to plead guilty. The judgment against Carter explicitly states:

> "And the said defendant Harice Leroy Carter commonly known as Roy Carter having been duly arraigned and being called upon to plead expresses a desire to plead guilty to the crime of murder as charged in the indictment. Thereupon the Court fully explained to the Defendant Harice Leroy Carter commonly known as Roy Carter the consequence of such plea and of all his rights in the premises including the right to have a lawyer appointed by the Court to defend him and also of his right to a trial before a jury of twelve jurors sworn in open Court and of the degree of proof that would be required to justify a verdict of guilty against him under the plea of not guilty but the defendant Harice Leroy Carter commonly known as Roy Carter persists in his desire to plead guilty and for a plea says he is guilty in manner and form as charged in the indictment."

This, then, is not a case in which intelligent waiver of counsel is a tenuous inference from the mere fact of a plea of guilty. *Rice* v. *Olson*, *supra*, at 788. A fair reading of the judgment against Carter indicates a judicial attestation that the accused, with his rights fully explained to him, consciously chose to dispense with counsel. And there is nothing in the record to contradict the judicial finding. From the common law record, we do not know what manner of man the defendant was. Facts bearing on

his maturity or capacity of comprehension or on the circumstances under which a plea of guilty was tendered and accepted are wholly wanting. We have only the fact that the trial judge explained what the plea of guilty involved. To be sure, the record does not show that the trial court spelled out with laborious detail the various degrees of homicide under Illinois law and the various defenses open to one accused of murder. But the Constitution of the United States does not require of a judge that he recite with particularity that he performed his duty.

The only peg on which the defendant seeks to hang a claim that his right to counsel was denied is the fact that the judge did assign him counsel when it came to sentencing. From this fact alone, we are asked to draw the inference that the accused was not capable of understanding the proceedings which led to his plea of guilty, and was therefore deprived of the indispensable assistance of counsel. We cannot take such a jump in reasoning. A trial court may justifiably be convinced that a defendant knows what he is about when he pleads guilty and that he rightly believes that a trial is futile because a defense is wanting. But the imposition of sentence presents quite different considerations. There a judge usually moves within a large area of discretion and doubts. Such is the situation under Illinois law. The range of punishment which a judge in Illinois may impose for murder is between fourteen years and death. It is a commonplace that no more difficult task confronts judges than the determination of punishment not fixed by statute. Even the most self-assured judge may well want to bring to his aid every consideration that counsel for the accused can appropriately urge. In any event, the designation of counsel to assist the accused at the sentencing stage of the prosecution in no wise implies that the defendant was not capable of intelligent self-protection when he pleaded guilty. Cf. *Canizio* v. *New York*, 327 U. S. 82.

We conclude that on the record before the Supreme Court of Illinois there was no showing that Carter's plea of guilty was made under circumstances which cut the ground from under the resulting sentence. In restricting its review to that record the Supreme Court of Illinois followed local practice, and the practice constitutes allowable State appellate procedure. Factors that might suggest fundamental unfairness in the proceedings before the trial judge—*e. g.*, the racial handicap of the defendant, his mental capacity, his inability to make an intelligent choice, precipitancy in the acceptance of a plea of guilty—are not before us because they were not in the common law record which was all that was before the Supreme Court of Illinois. Whether the defendant is entitled to press such claims to show a denial by the State of Illinois of a constitutional right, it will be time enough to consider when that issue is properly before us after being presented in a proceeding in the State courts appropriate to that purpose, or, if none is available, in a federal court. *Woods* v. *Nierstheimer, supra; Ex parte Hawk, supra.*

After indicating the restricted scope of review in this proceeding, the court below observed that under Illinois law a defendant who desires counsel must ask for it and show that he cannot afford one of his own choice. There are situations when justice cannot be administered unless persons charged with crime are defended by capable and responsible counsel. But there is nothing in the record before us to indicate that the circumstances made it necessary for Carter to have professional guidance other than that given by the trial court. There is therefore nothing in the statement of the Illinois Supreme Court alone from which we can infer that these normal requirements of Illinois law prejudiced this defendant or made their observance in this case incongruous with his constitutional rights.

Judgment Affirmed.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner,
v.
The People of the State of Illinois.

On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Douglas, with whom Mr. Justice Black and Mr. Justice Rutledge concur, dissenting.

If, as the opinion of the Court suggests, the Illinois Supreme Court had ruled that petitioner could not raise the question of his right to counsel by reason of the abbreviated common law record, I would agree that the judgment should be affirmed. For then petitioner would be remitted to other state procedures for vindication of his constitutional right. The Illinois Supreme Court rested on that ground when it refused to consider his claim that he was deprived of due process of law by reason of the method of his arrest and the unfairness of the trial. But when it came to consider the question of his right to counsel, the inadequacy of the record was not the ground it gave for barring him from showing that he was unqualified to waive the constitutional right:

> "His first contention is that the court erred in not appointing an attorney to represent him during arraignment. The right to be represented by counsel is one which the defendant may waive or claim, as he shall determine. No duty rests upon the court to provide legal assistance for an accused, unless he states, under his oath, his inability to procure counsel, and expresses a desire to have the court appoint one for him. (*People* v. *Braner*, 389 Ill. 190; *People* v. *Corrie*, 387 Ill. 587; *People* v. *Childers*, 386 Ill. 312.) There being no bill of exceptions, and it not appearing that plaintiff in error sought to have an attorney appointed for him, this assignment of error cannot be sustained. *People* v. *Stubblefield*, *post*, p. 609;

> *People* v. *Stack*, *ante*, p. 15; *People* v. *Braner*, 389 Ill. 190." 391 Ill. 594, 595; 63 N. E. 2d 763, 764.

By the rule there announced the record was inadequate only in one respect—the absence of a bill of exceptions showing that petitioner asked that an attorney be appointed for him. But that neglect by a defendant is not fatal, at least in a capital case. If a defendant is not capable of making his own defense, it is the duty of the court to appoint counsel, whether requested so to do or not. *Williams* v. *Kaiser*, 323 U. S. 471, 476. As we stated in that case, pp. 475–476:

> "The decision to plead guilty is a decision to allow a judgment of conviction to be entered without a hearing—a decision which is irrevocable and which forecloses any possibility of establishing innocence. If we assume that petitioner committed a crime, we cannot know the degree of prejudice which the denial of counsel caused. See *Glasser* v. *United States*, 315 U. S. 60, 75–76. Only counsel could discern from the facts whether a plea of not guilty to the offense charged or a plea of guilty to a lesser offense would be appropriate. A layman is usually no match for the skilled prosecutor whom he confronts in the court room. He needs the aid of counsel lest he be the victim of overzealous prosecutors' of the law's complexity, or of his own ignorance or bewilderment."

Therefore the least which we should do is to vacate this judgment and remand the case to the Illinois Supreme Court. For as MR. JUSTICE MURPHY points out, there is ample evidence in the record, certified to us from that court, to support petitioner's claim that he was not capable of making his defense. If that evidence may be considered in this proceeding, petitioner should prevail. Though the basis of the action of the Illinois Supreme Court be deemed less clear than I have indicated, a remand to it would be appropriate so that any state procedural question may be untangled from the question arising under the federal constitution. See *State Tax Commission* v. *Van Cott*, 306 U. S. 511.

SUPREME COURT OF THE UNITED STATES

No. 36.—October Term, 1946.

Harice Leroy Carter, Petitioner, v. The People of the State of Illinois. | On Writ of Certiorari to the Supreme Court of the State of Illinois.

[December 9, 1946.]

Mr. Justice Murphy, dissenting.

The admitted facts of this case plainly reveal that the petitioner has not been convicted of murder and sentenced to 99 years in prison in accordance with due process of law. Rather he has been deprived of his freedom for life without the aid of an attorney to guide him along the complicated and twisting labyrinths of the law. And there is no affirmative indication that he intelligently waived his right to counsel or that he understood the intricate legal problems involved in his indictment and conviction. Due process cannot thrive in the absence of such evidence.

There is an initial problem as to what evidence is before this Court at this time. It is said that we are limited to the common law record before the Supreme Court of Illinois, a record that includes only the indictment, the judgment on the plea of guilty, the minute entry bearing on the sentence, and the sentence itself. We are asked to close our eyes to a transcript of testimony in connection with a hearing on mitigation of the offense. This testimony was taken after the conviction. It has been certified, presumably by the stenographer recording the testimony at the hearing, and notarized. It appears in the printed record before this Court. We are also asked to overlook certain information about the petitioner given to the Illinois State Penitentiary by the State's attorney and concurred in by the presiding judge. The State of Illinois does not deny any of these facts; it merely requests that we disregard them as did the Supreme Court of Illinois, that we blind ourselves to what is printed in the record before us.

Legal technicalities doubtless afford justification for our pretense of ignoring plain facts before us, facts upon which a man's very life or liberty conceivably could depend. Moreover, there probably is legal warrant for our not remanding the case to the Supreme Court of Illinois to allow those facts to be incorporated in the formal record before it and to reconsider its decision in light thereof. But the result certainly does not enhance the high traditions of the judicial process.

In my view, when undisputed facts appear in the record before us in a case involving a man's life or liberty, they should not be ignored if justice demands their use. Here the facts in question fortunately are not crucial, since the bare common law record alone reveals a lack of due process. But the additional facts do serve to emphasize the absence of an intelligent waiver of counsel and petitioner's failure to comprehend the legal problems placed in his path. They serve to make any decision on the issue in the case more intelligent and more just. The discussion that follows, therefore, is based on all the certified facts in the record before us.

Petitioner, a Negro, was 30 years of age at the time of the relevant events in 1928. He had no schooling, although he was able to read and write. He was of average mentality and had never before run afoul of the law. During the preceding eleven years he had worked as a cook and a mechanic. By reputation he was quiet and industrious.

While driving a car back from a fishing trip, petitioner became involved in a bitter and prolonged dispute with the driver of a horse-drawn gravel wagon over the right-of-way on a road. This driver, a white man, refused to give petitioner enough room to pass. A violent argument in racial terminology ensued; rocks and gravel were thrown at petitioner's car. Eventually, when the dispute was renewed after a short interval, the driver got off his wagon and advanced toward petitioner's car. Petitioner

claimed that he thought the driver was reaching into his shirt for a gun. Petitioner got out of his car and fired three times, killing the driver.

Petitioner was taken into custody that same evening and was questioned far into the night. He was taken to an adjoining town, allegedly to avoid mob violence. Twelve days later, on June 12, 1928, he was indicted. It was charged that he "did then and there unlawfully, and feloniously, with malice aforethought, by shooting, kill" the named individual. On June 15 he was arraigned without the benefit of counsel, it being alleged by petitioner that he was held incommunicado from the time of his arrest. He was handed a copy of the five-page indictment, under which he could have been convicted of first-degree murder, lesser degrees of homicide, voluntary or involuntary manslaughter, assault with a deadly weapon, or lesser degrees of assault. Various considerations of defense, including self-defense, were accordingly raised. Upon being asked how he pleaded, he expressed a desire to plead guilty as charged in the indictment. The trial court's order, which bears striking resemblance to the Illinois statute on the subject (Ill. Rev. Stat., 1945, Ch. 38, par. 732), recited that the judge "fully explained" to petitioner "the consequences of such plea" and his rights to counsel and to jury trial, but that petitioner "persists in his desire to plead guilty" as charged. There is no affirmative evidence that petitioner understood the necessary consequences of his plea or that, fully appreciating all of his legal rights, he intelligently waived his rights to counsel or to jury trial. All that appears is that he "persisted" in his desire to plead guilty and that the court convicted him of murder, the statutory punishment for which was death by electrocution or imprisonment for any period from fourteen years to life.

A further hearing was held on the same day and an attorney was appointed, apparently not at petitioner's request, to represent petitioner at a hearing upon the

"question of mitigation or aggravation of said crime of murder to which defendant has pleaded guilty." Such a hearing was required by state law (Ill. Rev. Stat., 1945, Ch. 38, par. 732) where a guilty plea has been entered and where the court has discretion as to the extent of the punishment. A hearing on this matter was held three days later, on June 18, petitioner's appointed counsel being present. On June 29, in the absence of counsel, petitioner appeared in court and was sentenced to serve 99 years in prison.

I do not believe that these facts add up to due process of law. Petitioner, an uneducated, bewildered layman, was allegedly held incommunicado for fifteen days and was then called upon to make a vital decision upon the basis of his unintelligent understanding of the indictment—a legalistic, verbose document of five pages which would doubtless mean many things to many learned lawyers in light of the particular facts involved. Petitioner's very life and liberty depended upon his ability to comprehend the variety of crimes covered by the indictment and which one, if any, applied to the facts of his case. He was compelled to weigh the factors involved in a guilty plea against those resulting from the submission of his case to a jury. He was forced to judge the chances of setting up a successful defense. These are all complicated matters that only a man versed in the legal lore could hope to comprehend and to decide intelligently. Petitioner obviously was not of that type. Yet at this crucial juncture petitioner lacked the aid and guidance of such a person. In my view, it is a gross miscarriage of justice to condemn a man to death or to life imprisonment in such a manner. See *Powell* v. *Alabama*, 287 U. S. 45; *Williams* v. *Kaiser*, 323 U. S. 471; *Rice* v. *Olson*, 324 U. S. 786.

It is said, of course, that petitioner waived his right to counsel. My answer is that such action is immaterial in a capital case of this nature without affirmative evidence of an intelligent waiver. Such evidence is non-existent

here, even looking solely at the common law record. Its absence becomes even more emphasized when we view the background of ignorance, racial antagonism and threats of mob violence. When the life of a man hangs in the balance, we should insist upon the fullest measure of due process. Society is here attempting to take away the life or liberty of one of its members. That attempt must be tested by the highest standards of justice and fairness that we know. It is no excuse that the individual is willing to forego certain basic rights unless we are certain that he has a full and intelligent comprehension of what he is doing. Otherwise we take from due process of law a substantial part of its content.

Nor is it significant that counsel was appointed for petitioner to represent him at the hearing as to the mitigation of the offense. The error was done, the damage was committed, when petitioner was arraigned, compelled to plead and convicted without the assistance of counsel. The special hearing on mitigation held thereafter, for which counsel was provided, ~~provided~~ no opportunity for undoing the effect of the unaided arraignment or plea of guilty. Cf. *Canizio* v. *New York*, 327 U. S. 82. The failure to have counsel in regard to those matters permeated the entire proceeding, with indelible effects that could not be removed at the special hearing. Due process of law still was lacking.

Insistence upon counsel at all stages of a capital case, where an intelligent waiver is lacking, imposes no intolerable burden upon the law enforcement process. It is merely a recognition of our attempt to be civilized, a recognition that the process of condemning human life is to be judged by standards higher than those applied to a prosecution for violation of a minor ordinance or regulation.

I would therefore reverse the judgment below.